National Steel and Shipbuilding Company *and* Shopmen's Local Union No. 627, affiliated with the International Association of Bridge, Structural, and Ornamental Ironworkers, AFL–CIO and International Brotherhood of Electrical Workers, Local Union 569, and AFL–CIO and Shipwrights, Boatbuilders & Helpers, Carpenters, Local # 1300, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO and International Association of Machinists and Aerospace Workers, Local Lodge 389, District Lodge 50, AFL–CIO. Cases 21–CA–29275, 21–CA–29591, 21–CA–29702, 21–CA–29283, 21–CA–29288, and 21–CA–29367

September 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 22, 1996, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions as further discussed below, and to adopt the recommended Order as modified and set forth in full below.[3]

1. The judge found that the Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of the Unions' rallies held outside of gate 6 between approximately late February and the end of May 1993. We agree with the judge's finding, for the reasons set forth by him, and for the additional reasons set forth below.

The judge correctly observed that the fundamental principles governing employer surveillance of protected employee activity are set forth in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). The Board in *Woolworth* reaffirmed the principle that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial recordkeeping tends to create fear among employees of future reprisals. The Board in *Woolworth* reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity. Id.; *Flambeau Plastics Corp.*, 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128 (7th Cir. 1968), cert. denied 393 U.S. 1019 (1969). Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. ''[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing.'' *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976). The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case. *Sunbelt Mfg., Inc.*, 308 NLRB 780 fn. 3 (1992), affd. in part 996 F.2d 305 (5th Cir. 1993).[4]

We have carefully reviewed the record evidence of all the circumstances surrounding the Respondent's videotaping of the union rallies held outside of gate 6 between approximately late February 1993[5] and the end of May 1993. The record establishes that gate 6 is a main entrance to the Respondent's shipyard, through which most of the Respondent's employees—bargaining unit and nonbargaining unit alike—enter

[1] The judge denied the Respondent's motion to defer to the grievance-arbitration proceedings the complaint allegations that the Respondent violated Sec. 8(a)(1) and/or 8(a)(3) by assessing disciplinary ''points'' to certain employees. The Respondent has excepted to the judge's ruling solely ''in order to preserve its rights to argue deferral should exceptions be filed by the General Counsel and/or any of the Charging Party Unions to the dismissal of the discipline allegations.'' As no exceptions have been filed to the dismissal of the discipline allegations, it is unnecessary to pass on the Respondent's exception to the denial of the motion to defer.

[2] The judge found that on two occasions (in March 1993 and in September 1993) the Respondent violated Sec. 8(a)(1) of the Act by conveying to employees the impression that it was engaging in surveillance of their protected concerted activities. We adopt the judge's finding of a violation in March 1993. We find it unnecessary to pass on the question whether the Respondent also violated the Act in September 1993, because the finding of such an additional violation would be cumulative and would not affect the Order.

[3] We shall modify the judge's recommended Order to comport with the violations found, the remedy as modified infra, and with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] We do not adopt the judge's statement that the burden-of-proof scheme set forth in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), is applicable in the context of surveillance allegations. We likewise do not adopt the judge's discussion regarding *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040 (1994), as no exceptions were filed in that case to the judge's surveillance findings. We further do not adopt the judge's statement that an employer's subjective, honest belief that unprotected conduct may occur constitutes solid justification for recordation of protected activity. Rather, under the legal principles we have recited, the employer must show that it had a reasonable, objective basis for anticipating misconduct.

[5] The record evidence is equivocal as to whether the union rallies, in fact, commenced in late February or early March 1993. This does not affect the outcome in this proceeding, however. The record does establish that it was the Unions' rejection of the Respondent's final contract proposal on February 19, 1993, which effectively triggered the gate 6 union rallies.

and exit the shipyard. The Unions[6] had often held rallies at gate 6 during strikes and labor disputes previous to the instant dispute. The Respondent maintains a guard shack located at the gate 6 entrance. The judge found that these earlier gate 6 union rallies occurred ''always within the sight and hearing range of the main guard shack at the entrance.'' Further, adjacent to gate 6 is building 15, where the judge found that ''two video-only security cameras had always been mounted and used to monitor the Gate 6 area and nearby parking lot'' as part of the Respondent's regular security system.[7]

The gate 6 union rallies entailed union leaders using electronic bullhorns to make speeches and exhort attendees and workers who were passing by to demonstrate their solidarity. The judge found that a typical example was the exhortation that union workers should not enter the shipyard until 6:40 a.m., which is 5 minutes before the scheduled start of the morning shift, and then should enter en masse shouting slogans such as ''it's union time.'' No party to this proceeding disputes the judge's characterization of the gate 6 union rallies as ''noisy-but-peaceful.''

At the commencement of the gate 6 union rallies in approximately late February 1993, the Respondent's captain of security operations, Eugene Hutchins, positioned a tripod-mounted videocamera with audio capability atop the roof of building 15 in order to, as the judge found, ''conspicuously document the[] rallies.'' The union rallies were uniformly held prior to the morning shift change time. Hutchins testified that he would operate the rooftop videocamera himself and turn it on ''about the time when they would start their activities and then turn it off when they ended their activities, which was usually about 6:15 to 6:40 [a.m.]'' Hutchins' activity from atop building 15 and the tripod-mounted videocamera itself were plainly visible to employees in the gate 6 area. Hutchins' continuous videotaping of every gate 6 union rally is alleged to constitute unlawful surveillance, and the judge found merit in this complaint allegation. There is no dispute that the gate 6 union rallies constituted protected, concerted activity under Section 7 of the Act.

The record evidence establishes that the gate 6 union rallies during the instant labor dispute were held in full view of the guard shack at gate 6. The Respondent's manager of industrial relations, Carl Hinrichson, testified that the union rallies were held in ''full view of the guards.'' The record further establishes that there were three or four security guards on regular duty at the gate 6 guard shack at the morning shift change time when the union rallies occurred. In addition, Elwood ''Woody'' Breece, an hourly employment system manager in the Respondent's industrial relations department, testified that he was stationed in the gate 6 guard shack, according to instructions by Hinrichson, every morning after the union rallies began in order to observe the union activity at gate 6.[8]

Breece testified that Hinrichson instructed him to observe what was going on, and that if there was any type of violence, disruption, or harassment, he was to film it. Breece testified that he had a videocamera in his possession for this purpose, which he sometimes carried, or kept on the desk or counter in the guard shack, but that he never observed any violence or misconduct in fact occurring, and that he therefore never used the videocamera to record any activity. Breece further testified that after ''a couple of weeks'' of observation he reported to Hinrichson that ''nothing was going on'' at the union rallies, and that he was then directed to cease his videotape post at the gate 6 guard shack.

Captain of Security Hutchins nevertheless continued thereafter to operate the tripod-mounted videocamera from atop building 15 to record every gate 6 union rally. The Respondent does not dispute the judge's finding that ''as time wore on, and nothing appeared to be happening at these rallies of any particular security concern to [the Respondent], Hutchins eventually just left the equipment standing on the roof, where it was timed to go on and off at prescribed intervals associated with shift-change times.'' The Respondent kept the tapes of these recorded rallies. Hutchins testified that he ceased videotaping in June 1993.

Two important points emerge from this record evidence. First, the record evidence does not support the Respondent's contention that security concerns justified the videotaping of union activities outside gate 6. There is no dispute that the gate 6 union rallies were held in full view of the manned gate 6 guard shack. The Respondent had equipped personnel assigned to the guard shack with a videocamera to record any misconduct that might occur. Further, the Respondent emphasizes in its brief that the two permanent video security cameras atop building 15 which scan the gate 6 area and nearby parking lot have a recording capability, as we discuss infra.[9] Under these circumstances,

[6] The judge found that seven different Unions represent separate segments of the Respondent's approximately 2900 hourly paid workers.

[7] The Respondent's use of the existing building 15 security cameras, as well as the Respondent's comprehensive security system as it existed at the time the gate 6 union rallies began, are not alleged to be unlawful.

[8] Breece testified:

Q: Could you see what was going on in the Gate 6 parking lot from where you were stationed there in the guard shack.

A: Yes, I had a pretty good view.

Wayne Bunt, a sergeant in the Respondent's security department, likewise testified that all activity in the gate 6 parking lot was visible through the windows of the guard shack.

[9] The judge noted that these cameras do not cover the immediate gate 6 entry area, which is, however, directly visible to guards in the guard shack.

we reject the respondent's contention that operating the tripod-mounted videocamera atop building 15 to continuously record each gate 6 union rally for approximately 3 months was necessary to achieve any legitimate security objective. Rather, the evidence supports the conclusion that the Respondent's policy of providing video equipment to personnel at the gate 6 guard shack, who had an unimpeded view of the union rallies, as well as the Respondent's permanent security camera system which is not alleged to be unlawful, were adequate to deal with any legitimate security concerns at gate 6. In so finding, we recognize that an employer has the right to maintain security measures necessary to the furtherance of legitimate business interests during the course of union activity. See *Parsippany Hotel Management v. NLRB*, 99 F.3d 413, 420 (D.C. Cir. 1996). We have also taken into account that the Respondent's primary customer, the United States Navy, imposes certain contractual security requirements on the Respondent.[10] The Board is mindful in this case, as in every case, of the Supreme Court's instruction to ''appraise carefully the interests of both sides of any labor-management controversy[.]'' *NLRB v. United Steelworkers (Nutone, Inc.)*, 357 U.S. 357, 362–363 (1958). The record, however, simply does not support the Respondent's argument that the judge's unfair labor practice finding did not adequately take into account legitimate security concerns at gate 6.[11]

Second, the evidence establishes that the Respondent itself recognized, after observing the gate 6 union rallies for a couple of weeks, that no violence or other misconduct was occurring which warranted the videotaping of the rallies. Breece unequivocally testified that he never witnessed any misconduct at gate 6 and thus never had occasion to record any of the union rallies. The Respondent accepted Breece's report that ''nothing was going on'' at the union rallies, and thus no longer stationed him at the gate 6 guard shack for videotaping. By its own actions, the Respondent thus demonstrated that it did not believe that violence or other misconduct would occur at the gate 6 union rallies, yet it continued to videotape every rally. These facts provide substantial evidence establishing that the Respondent engaged in surveillance of protected activity without ''solid justification'' in violation of the Act.

[10] The Respondent does not contend that any contractual requirement with the U.S. Navy bound it to place the tripod-mounted videocamera atop building 15 to record the gate 6 union rallies.

[11] The record evidence also does not support the Respondent's assertion in its brief that Hutchins' continuous rooftop videotaping was necessary because ''[a]ll too often, unlawful or unprotected conduct occurs instantaneously, with no warning, and is over within a matter of seconds.'' We note that the Respondent's other security measures provided it with the capability to record even abruptly occurring events, indeed that was the very purpose for which the Respondent stationed Woody Breece at the gate 6 guard shack.

In contending otherwise, the Respondent cites first to evidence of events occurring immediately before and after the Unions' rejection of the Respondent's final contract proposal on February 19, 1993, which effectively triggered the gate 6 union rallies.

We have carefully considered all of the relevant evidence and have set forth below the entire list of events as described by the Respondent itself in its brief in support of exceptions.[12] The Respondent asserts, and there is no dispute, that the union conduct commencing around February 19, 1993, was part of the Unions' ''Inside Game'' strategy. The judge found that the ''Inside Game'' is a union strategy in which employees, in lieu of striking, remain on the job and take measures inside the employer's facility designed to put economic pressure on the employer to change its position at the bargaining table. The record evidence establishes that the Respondent was fully aware of the Unions' ''Inside Game'' strategy. The judge found that the strategy succeeded in harassing and confusing the Respondent, and that the Unions during the ''Inside Game'' engaged in both protected conduct and certain unprotected conduct.[13] Nevertheless, none of the conduct described as part of the ''Inside Game,'' even as recited by the Respondent, took place at the gate 6 union rallies. As the judge observed, the methods of the ''Inside Game'' involved actions occurring within the Respondent's shipyard: work stoppages, slowdowns, and the like. We accordingly agree with the judge that union activity within the shipyard during working hours did not provide solid justification for the Respondent to have reasonably anticipated misconduct outside the shipyard at gate 6 during peaceful

[12] The Respondent describes the following conduct: union flyers warned of a strike on February 22 ''or any day after'' and promoted union solidarity by endorsing ''work-to-rule, strikes, in-plant solidarity activities, and other forms of resistance calculated to cause enough economic damage to make a concession-demanding company reconsider''; a union flyer warned that ''shark repellent was coming''; shop stewards held special meetings with employees throughout the yard; the company was forced to implement new rules about the unauthorized use of whistles in the shipyard; some 500 employees engaged in a sickout; employees started failing to show up for weekend overtime work they had agreed to work; the Unions marched on and demonstrated at the residence of the Respondent's president; the Unions wrote the U.S. Navy indicating they were working without a contract and might strike at any time; about 50 to 70 employees returned to work late after lunch on March 17 after attending a union meeting within the shipyard, and 1 employee was suspended; 10 electricians walked off the job and were suspended for 3 workdays; rumors of strikes, partial strikes, and walkouts after lunch were circulated almost daily; and the Unions held three 1-day strikes on April 29, May 17, and June 23, 1993.

[13] The General Counsel stipulated that the Unions' 1-day strikes occurring on April 29, May 17, and June 23, 1993, were not protected under the Act because they were ''intermittent strikes.'' The judge found that the work stoppage after lunch on March 17, 1993, involving approximately 50 or more workers was likewise not protected.

union rallies conducted prior to working hours at the morning shift change time.

Second, the Respondent cites evidence establishing that acts of union violence or misconduct have occurred during each strike that has taken place at the shipyard since 1980, including during an October 1992 strike.[14] We have carefully considered this evidence, in light of the fact that the instant dispute involved the ''Inside Game'' strategy, rather than a strike.

The record evidence establishes that the August 1988 strike followed an 11-month contract hiatus during which the Unions conducted—as in this case—an ''Inside Game'' while employees remained on the job. Captain of Security Hutchins testified that the Union held gate 6 rallies virtually every day during the entire 11-month period in 1987–1988 during which the Unions were pursuing this strategy. Significantly, there is no evidence that any misconduct occurred at the gate 6 rallies conducted during the 1987–1988 ''Inside Game'' period, nor is there evidence that the Respondent reasonably anticipated that any such conduct would occur.

We find that this record evidence supports the judge's conclusion that the history of violence or misconduct associated primarily with strikes at the Respondent's facility did not justify the Respondent's surveillance of peaceful union rallies conducted during nonstrike periods. In the instant case, the Unions decided, as they did during an 11-month period in 1987–1988, not to strike, but to pursue an ''Inside Game.'' The gate 6 union rallies held during the 1987–1988 ''Inside Game'' were uneventful, and the Respondent failed to establish that it had a reasonable basis to anticipate that the gate 6 union rallies conducted during the 1993 ''Inside Game'' would differ in any material respect. The judge thus appropriately observed that strikes ''carry the potential for hostile confrontations between strikers and nonstrikers or replacements, or between strikers and others seeking to do normal business with the struck enterprise. Here, that potential was lacking; the Unions had decided in late February [1993] to have their members stay on the job while the contract struggle continued.'' The record evidence fully supports the judge's finding that ''there is no evidence of employee misconduct during the rallies, nor any evidence that [the Respondent] honestly believed that there was misconduct going on during the rallies, much less any evidence that [the Respondent] planned to go to the police or to a court for relief against any such perceived misconduct.''[15]

The Respondent finally argues that its continuous videotaping of the protected union rallies cannot be deemed to have a reasonable tendency to interfere with employee participation in the protected rallies, in light of the judge's finding that certain employees and union officials who engaged in the gate 6 rallies seemed ''bluffly indifferent'' to the videotaping and shouted ''messages'' intended to reach the Respondent's president Vortmann, who the judge found was ''presumed to be an avid viewer of Hutchins' tapes.'' The record evidence shows that out of approximately 2900 unionized workers employed in 1993, the gate 6 union rallies rarely had more than 100 attendees, if that many. We agree with the judge that the Respondent's conspicuous videotaping of the protected gate 6 union rallies warrants a finding that such continuous surveillance has a reasonable tendency to interfere with participation in the protected rallies by the overwhelming majority of workers other than the ''handful of stalwarts who participated in the rallies despite such recording.'' The record evidence warrants the inference that employees who did not wish to be permanently identified on the Respondent's videotapes as union ''stalwarts'' would reasonably refrain from taking part in the gate 6 union rallies. The Respondent's assertion that its videotaping of union related activity at the shipyard has not resulted in retaliation against employees does not alone mitigate the reasonable tendency of the Respondent's continuous videotaping of protected activity to interfere with or restrain employees—who enjoyed no guarantee that direct or indirect reprisal or other stigma would not ensue—from participation in that protected activity.

For all these reasons, we find that the Respondent engaged in unlawful surveillance of the Unions' protected rallies held outside of gate 6 during the spring of 1993.

[14] This evidence is fully set forth in the judge's decision. The judge also fully detailed that the strike that ended when the parties reached their 1981–1984 agreement was preceded by a series of acts of violence or misconduct in the spring and summer of 1980, while predecessor labor agreements containing no-strike clauses were still in effect. We note that in sec. IV,E 3, second paragraph of the judge's decision, the judge inadvertently referred to union conduct which occurred in July 1980 as having occurred in July 1990.

[15] We have carefully considered the Respondent's argument that the 1-day unprotected ''intermittent strikes'' occurring on April 29, May 17, and June 23, 1993, provided justification for its videotaping. There is no record evidence, however, that those events were accompanied by any misconduct at the peaceful gate 6 rallies. Indeed, the Respondent's own actions contradict its assertion that these events led the Respondent to reasonably anticipate misconduct at gate 6. The Respondent ceased videotaping at the end of May, and did not resume after the June 23 1-day strike, thus establishing that the Respondent did not in fact reasonably anticipate misconduct at gate 6 based on that event. Likewise, the April 29 and May 17 strikes did not alter the Respondent's assessment that ''nothing was going on'' at gate 6, its discontinuation of Breece's gate 6 videotape post, and Hutchins' personal videotaping of the gate 6 rallies.

We acknowledge that there is evidence of serious misconduct preceding the strike in 1981. We find, however, that such evidence concerning events occurring 12 years earlier does not outweigh the much more recent evidence that no misconduct occurred during the gate 6 union rallies conducted for 11 months during the 1987–1988 ''Inside Game.''

2. We agree with the judge's finding that the Respondent's installation in late October 1993 of an additional, permanent security camera with a microphone attachment atop building 15 violated Section 8(a)(1) of the Act.

In October 1993, the Respondent's regular security system included closed circuit television security cameras at nine locations in and about the Respondent's shipyard, including the two existing security cameras atop building 15 which scanned the gate 6 area. Captain of Security Hutchins testified that none of these security cameras had a microphone or any audio capability.[16]

In late October 1993, however, the Respondent installed an additional, permanent security camera atop building 15. This new camera had a boom microphone attached to it. The boom microphone was plainly visible to individuals in the gate 6 area. By letter to the Respondent dated October 28, 1993, the Unions stated that it was ''completely intolerable'' that a ''huge Directional Mike'' had been installed ''next to the new camera that points at every worker who is being viewed at the peaceful meetings,'' and that ''workers have pointed out that out of all the [Respondent's] security cameras, this is the only one with an audio set up.'' The Unions requested that the Respondent remove the microphone.

The boom microphone was removed by the Respondent at some point in late 1993. Hutchins thereafter instructed Jim Clark, general foreman in the Respondent's maintenance department, to arrange with a private contractor to install a microphone to be mounted on the framework of a ''Digi-Dot'' temperature display sign, which is located at a higher elevation than the position of the disputed new camera atop building 15. Clark informed Hutchins, however, that the contractor had advised that the microphone ''wouldn't work there. It was going to have to be lower to the ground.'' Thereafter, on about February 1, 1994, the Respondent's contractor installed a new microphone which was concealed within a small electrical junction box halfway down an ivy-covered wall on the street side of building 15, near gate 6. The new microphone system was connected by wiring inside a green-painted conduit back to the new camera on the roof of building 15. The Respondent removed that microphone after union officials noticed the microphone and made a protest to manager of industrial relations, Hinrichson, during a bargaining session on February 11, 1994.

The record evidence confirms the judge's finding that the unprecedented microphone feature establishes the Respondent's wish to listen in on things being said during gate 6 union rallies. The judge cited Hutchins' testimony that placement of the microphone on the Digi-Dot sign was deemed unsatisfactory, because the sign was positioned so high that ambient street noise ''eliminated being able to hear anything or pick up specific information or communications that we were trying to pick up.'' Having concluded that its planned placement of the microphone at the Digi-Dot sign was inadequate,[17] the Respondent instead installed the microphone within the electrical junction box halfway down the ivy-covered wall on building 15, near gate 6. Hutchins testified that this final location of the microphone was according to the contractor's instruction that the microphone ''would have to be down about halfway on the wall in order to be useable.'' Jim Clark testified that the purpose of the microphone was ''to pick up some conversations, you would be able to pick up the area conversations within the area [sic].''[18] The express testimony of the Respondent's officials responsible for installation of the microphone, and their extensive efforts to secure the most effective location for audio surveillance, establish that the microphone attachment to the new videocamera atop building 15 was designed to have an audio capability to ''pick up specific information or communications'' from the union rallies at gate 6.

The Respondent does not contend in its exceptions that the placement of the new videocamera with microphone attachment in late October 1993 was justified because it reasonably anticipated misconduct by employees at the gate 6 union rallies. Indeed, Captain of Security Hutchins had stopped videotaping the gate 6 union rallies in June 1993, and he further testified that no specific instance occurred in October 1993 to cause the installation of the new camera with microphone attachment. Manager of industrial relations Hinrichson likewise testified that he told Fred Hallet, the Respondent's vice president and chief financial officer, in mid-October 1993 that he did not object to the new camera

[16] Hutchins noted that the camera at the ''zoo gate'' did have a two-way microphone so that a person wanting to enter that gate could push a button and speak with security personnel.

[17] The Respondent notes in its exceptions that, contrary to the judge's finding, it did not ultimately install the microphone at the Digi-Dot sign.

[18] Jim Clark testified as follows:

> Q: I guess my question is [the contractor] tells you [the microphones] won't work up on the digidot sign and they won't work at the top of the wall either, my question, work for what purposes? What were they supposed to pick up?
>
> A: I don't know what the purpose of it was. I was just asked to put in the system that had sound and was a good quality sound and video. For the purposes, I really don't know.
>
> Q: Well, they [the contractors] say it is not going to work up there?
>
> A: Right.
>
> Q: It is not going to work at the digidot and it is not going to work at the top of the wall. Don't you expect that they would have some idea as to what the working purpose was before they would say it is not going to work?
>
> A: I think the implied understanding was that you would be able to pick up some conversations, you would be able to pick up the area conversations within the area [sic].

but that ''I don't think we ought to be taping these little Gate [6] rallies that are occurring'' because ''it appeared that things were calming down, and I didn't see any reason to tape.''

Rather, the Respondent argues in its exceptions that the installation of the additional camera on building 15 with its microphone attachment was lawful, because it was installed as part of an ongoing upgrade of its security system. We find this defense to be without merit. Our careful review of the record reveals no evidence establishing the existence of any security upgrade program which contemplated the installation of a microphone-equipped videocamera atop building 15.

The Respondent cites two security upgrade plans: (1) an Authority for Expenditure (AFE) proposed by Captain of Security Hutchins in early 1990; and (2) security requirements set forth by the U.S. Navy in order for the Respondent to secure a contract to overhaul the U.S.S. Harry Hill.

Hutchins specifically testified that the security upgrade program set forth in the AFE was to replace *existing* videocameras at their same location with videocameras of upgraded capabilities; the AFE did not include the installation of any additional videocameras at any location. The AFE submitted by Hutchins in early 1990 requests ''closed-circuit television Component parts *to replace equipment now in service* that is nearing life expectancy. . . . These units have been in operation in excess of the 10 year life expectancy. The units are beginning to have an excessive down time due to worn out parts or components are deteriorating [sic] from the continuous exposure to the weather.'' (Emphasis added.) As Hutchins testified:

> Q: The camera that you ultimately put up on the northwest corner of building 15 was not part of this upgrading cycle, was it?
>
> A: No, it was not.

Further, nothing in the bid requirements for the U.S.S. Harry Hill overhaul requires audio surveillance. Rather, those requirements set forth that security must be provided for a fenced parking facility by one of several means, including: ''provide electronic video surveillance capable of sighting all parked vehicles, with travel response time of not more than 5 minutes by a security guard to the parking facility[.]'' There is no mention whatsoever of audio surveillance capability. Indeed, when Hutchins was asked whether the new building 15 camera was ''put into place in order to conform to Navy specs,'' he testified ''No.''

The first mention in the record evidence of the installation of the new videocamera on building 15 occurred in mid-October 1993 in a meeting with Manager of Industrial Relations Hinrichson, Vice President Hallet, and Personnel Director Tom Fawcett. The Respondent argues that in addition to the new building 15 videocamera with microphone attachment, the Respondent's upgrade at that time also included the installation of two security videocameras in the employee parking lots across from gate 6.[19] The Respondent asserts that the purpose of the installation of the new building 15 videocamera and the subsequent installation of the parking lot videocameras was to monitor criminal activity in the area of the gate 6 parking lots and a nearby trolley stop. The record evidence establishes that thefts and/or vandalism, and a mugging, had occurred in the area of the gate 6 parking lots.

The Respondent in its exceptions does not advance any argument, however, that an audio capability was necessary—or even desirable—to monitor criminal activity in the gate 6 area parking lots. Nor does the Respondent offer any explanation why the two new video-only security cameras installed in the parking lots in early 1994 do not have audio capability, but the microphone attachment to the newly installed building 15 camera was nevertheless required for security purposes. Indeed, the record shows that the Respondent ultimately installed a total of six permanent security cameras to monitor the parking lots, none of which have a microphone attachment. It is undisputed that the Respondent's comprehensive security system at over nine locations is video-only, and does not have a microphone or any audio capability. The Respondent has presented no credible evidence to support its defense that the microphone attachment to the new building 15 videocamera was installed to monitor criminal activity.[20]

We do not adopt, however, the judge's finding that the new building 15 videocamera was unlawful because, in addition to its unprecedented audio capability, it had the capability to record, rather than simply display, images that are monitored by security guards via closed circuit television. On the basis of an erroneous finding that none of the Respondent's cameras in its security system—other than the newly installed

[19] We note that Hutchins testified that while the new building 15 camera was installed in late October 1993, the new parking lot cameras were not installed until the first part of 1994

[20] The Respondent in its exceptions further defends its conduct by asserting that no employees were aware of the presence of the microphone it installed on the wall of building 15. (The Respondent does not dispute that the boom microphone attachment was plainly visible to employees.) Union officials Godinez and Archer, however, testified that they were among a group of employees debating whether the electrical junction box contained a microphone, and that they questioned an electrician working on the box, who told them it contained a microphone. Godinez thereafter protested the microphone in a bargaining session with the Respondent. In any event, it has long been held that surveillance may be unlawful regardless of whether the employees knew of it. *NLRB v. Grower-Shipper Vegetable Assn.*, 122 F.2d 368, 376 (9th Cir. 1941); *Bethlehem Steel Co. v. NLRB*, 120 F.2d 641, 647 (D.C. Cir. 1941).

building 15 camera—have such a capability to record, the judge recommended in his Order that the Respondent permanently disable the recording feature of the building 15 video camera. Captain of Security Hutchins testified, however, and the General Counsel concedes, that all of the Respondent's cameras in its security system in fact have the capability to record, if so activated by a security guard monitoring the video displays from the security cameras. We shall accordingly modify the judge's recommended Order to require only that the Respondent permanently disable the audio capability of the building 15 camera to make an audio record of employees engaged within its scanning range in activities protected by Section 7 of the Act.[21]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, National Steel and Shipbuilding Company, San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Using videocameras or other image or sound capturing devices for the purpose of monitoring and/or recording employees engaged in concerted activities protected by Section 7 of the Act, without proper justification.

(b) Conveying to employees the impression that it is engaging in surveillance of their protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Destroy any copies in its possession of video or audio tape records of union rallies conducted at gate 6 between approximately February 17, 1993, and the indefinite point later in the spring of 1993 when it ceased to record such rallies.

(b) Permanently disable the ability of the surveillance camera first mounted in late October 1993 on building 15 to make an audio record of employees engaged within its scanning range in concerted activities protected by Section 7.

(c) Within 14 days after service by the Region, post at its place of business in San Diego, California, copies of the attached notice marked ''Appendix.''[22] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 19, 1993.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT use videocameras or other image or sound capturing devices for the purpose of monitoring and/or recording employees engaged in concerted activities protected by Section 7 of the Act, without proper justification.

WE WILL NOT convey to employees the impression that we are engaging in surveillance of their protected concerted activities.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL destroy any copies in our possession of video or audio tape records of union rallies conducted at gate 6 between approximately February 17, 1993, and the indefinite point later in the spring of 1993 when we ceased to record such rallies.

WE WILL permanently disable the ability of the surveillance camera first mounted in late October 1993 on building 15 to make an audio record of employees engaged within its scanning range in concerted activities protected by Section 7.

NATIONAL STEEL AND SHIPBUILDING COMPANY

[21] We note that Hutchins testified that while the boom microphone is not currently in use, the building 15 camera still maintains a mounting bracket for the microphone, and that it is still capable of being hooked up.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Robert R. Petering, Esq., for the General Counsel.
William C. Wright and *Theodore R. Scott, Esqs. (Littler, Mendelson, Fastiff, Tichy & Mathiason)*, of San Diego, California, for the Respondent, NASSCO.
Robert Godinez, Business Representative, of San Diego, California, for the Charging Party, Ironworkers Local 627.
Peter Zschiesche, Business Representative, of San Diego, California, for the Charging Party, Machinists Local Lodge 389.
James Archer, Asst. Business Manager, of San Diego, California, for the Charging Party, IBEW Local 569.
Mario Real, Business Representative, of Chula Vista, California, for the Charging Party, Carpenters Local 1300.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. The General Counsel of the National Labor Relations Board, acting through the Regional Director for Region 21, brought these consolidated unfair labor practice prosecutions against National Steel and Shipbuilding Company (NASSCO), and I heard the trial of the cases in San Diego, California, on August 16–19 and October 24–28, 1994. Most of the material events occurred during a period in 1993[1] when NASSCO and the seven unions who represent NASSCO's shipyard workers were locked in a protracted bargaining contest over terms for new labor agreements, a dispute that remained unresolved when the trial record closed. The prosecutions as they are currently focused emerged from the following casehandling developments:

On various dates between mid-March and late October, each of the four Local Unions fully-named in the case caption (Ironworkers, Electrical Workers, Carpenters, and Machinists) filed at least one of the unfair labor practice charges against NASSCO whose docket numbers appear in the case caption.[2] Also, on May 19, an individual named Mai Chu filed a separate charge against the Ironworkers, in Case 21–CB–11554. On December 28, the Regional Director issued a ''Second Order Consolidating Cases, Amended Consolidated Amended Complaint and Notice of Hearing.'' This complaint named both NASSCO and the Ironworkers as respondent parties, and alleged that each respondent had unlawfully restrained or coerced employees in the exercise of rights protected by Section 7 of the National Labor Relations Act, which declares pertinently,

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

More specifically, the December 28 complaint alleged in certain counts that NASSCO violated Section 8(a)(1) of the Act[3] when, during various periods in and after early March, its agents used still cameras and video and audio recording equipment to conduct ''surveillance'' of employees engaged on its premises in activities protected by Section 7, and when, on September 16, certain NASSCO agents stood by and observed a lunchtime rally within the shipyard called by the Unions. In other counts, the complaint alleged that NASSCO violated Section 8(a)(1) and/or Section 8(a)(3)[4] by assessing ''attendance points'' against certain employees who participated in two such allegedly protected activities—the job actions of March 17 and 19, infra—and by imposing further discipline on two participants in the March 17 action, and on all the 10 electricians who participated in the March 19 action. In still other counts, the complaint alleged that NASSCO violated Section 8(a)(1) when it ''threatened'' its employees in a ''letter'' dated March 19, that they could be disciplined if they were to engage in activities similar to their March 17 action, and when one or more supervisory agents of NASSCO made similar threats in conversations with certain individual employees.

In yet other counts, the December 28 complaint separately charged the Ironworkers with violating Section 8(b)(1)(A) of the Act[5] by threatening employees with internal union discipline for refusing to participate in a 1-day strike on May 17, which strike, according to the complaint, ''was part of a pattern of intermittent work stoppages unprotected by Section 7[.]'' However, shortly before this trial opened, the Regional Director reached a settlement with the Ironworkers, and thus issued an order on August 12, 1994, severing Case 21–CB–11554 from the complaint and withdrawing the counts against the Ironworkers.[6]

NASSCO's Position on the Merits

NASSCO admits, and I find, that it is and has been at all material times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[7] NASSCO also effectively admits that it did most of the things the De-

[1] All dates below are in 1993 unless I say otherwise.

[2] In many cases the Charging Party Unions amended these docketed charges during or at the end of the period each was under investigation by the Regional Director. The trial record also shows, but not systematically, that in the same March through October period, the Charging Party Unions filed other charges against NASSCO which were either withdrawn or dismissed as nonmeritorious, including several relating to behavior by NASSCO which is incidentally described in this decision.

[3] Sec. 8(a)(1) makes it unlawful for an employer to ''interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.''

[4] Subject to certain provisos not relevant to these cases, Sec. 8(a)(3) makes it unlawful for an employer to ''discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.''

[5] Sec. 8(b)(1)(A) makes it unlawful for a labor organization to ''restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7.''

[6] Notwithstanding this, the captions on the official trial transcript volumes and the bound exhibits have continued, erroneously, to include Case 21–CB–11554 in the list of the cases that were tried and submitted for decision.

[7] NASSCO further admits, and I find, that as a corporation it operates a shipyard in San Diego, California, that it annually buys more than $50,000 worth of materials directly from suppliers outside California and performs more than $50,000 worth of work for the United States Navy, and that its operations have a substantial impact on the national defense of the United States.

cember 28 complaint attacks, although it quarrels in most instances with the conclusionary adjectives and verbs used in that complaint to characterize its own actions or those of the workers against whom it allegedly acted unlawfully. In any case, NASSCO denies that it did anything unlawful, and its most fundamental defense to all counts in the complaint is that its complained-of actions were legally privileged reactions to union-induced activities by employees, or threats thereof, that do not enjoy Section 7's protections—most notably, intermittent striking or ''partial-strike'' job disruptions staged or threatened by the Unions to put pressure on NASSCO at the bargaining table, all as part of a strategy known to the Unions as the ''Inside Game.''

NASSCO's Renewed Motion to Defer: Denied

There is no dispute that in late February, following months of bargaining and the seven Unions' recent rejection of NASSCO's ''last offer,'' NASSCO implemented the terms of that offer, announcing in the process that it would honor the grievance-arbitration scheme comprehended within that offer. On brief, NASSCO has renewed a motion to defer these proceedings, effectively a motion asking me to order the Charging Parties to submit the issues underlying these cases to the grievance-arbitration procedure apparently available under NASSCO's implemented last offer, and to defer any prosecution of these cases pending such a submission. I denied this motion at the outset of the trial. I reaffirm that ruling, for substantially the same reasons, as amplified below:

Without deciding whether any of the statutory issues in this case are ''susceptible'' of, or are ''eminently suitable'' for, resolution in the grievance-arbitration forum, or whether the more expansive, prearbitration deferral criteria introduced by the Board in *United Technologies Corp.*, 268 NLRB 557 (1984), might be satisfied in other respects, I find it fatal to NASSCO's deferral motion that there is no showing that any of the Charging Party Unions have agreed to submit any such issues to the grievance-arbitration forum. Thus, where there is no identifiable ''bargain'' to which the Board might ''hold'' the Charging Party Unions, we lack the necessary element invoked by the *United Technologies* majority to rationalize its broadened policy of ''holding the parties to their bargain by directing them to avoid substituting the Board's processes for their own mutually agreed-on method for dispute resolution'' (id. at 558, characterizing the rationale of *Collyer Insulated Wire*, 192 NLRB 837 (1971)), and of ''adjuring the parties to seek resolution of their dispute under the provisions of their own contract[.]'' Id. at 559, quoting *National Radio Co.*, 198 NLRB 527 (1972).

Arguing against this reasoning on brief, NASSCO maintains that the Board has the power to adjure the Charging Parties here to submit the disputes underlying these cases to its ''available'' grievance-arbitration scheme even in the absence of the Charging Parties' agreement to use that forum to resolve disputes like those presented here. And in support of this proposition, NASSCO calls my attention to *August A. Busch & Co.*, 309 NLRB 714 (1992), a case, I concede, which invites just such an interpretation. Thus, in *Busch*, the Board, applying *United Technologies*, supra, did indeed hold that even though the parties' contract only provided that ''[t]he Union . . . *shall have the right*'' to submit disputes to the grievance-arbitration scheme provided in the contract, this was no bar to deferral. Id. at 716, discussing authorities. Rather, the Board declared, ''So long as an adequate contractual grievance procedure culminating in arbitration is *available* to the party seeking a Board adjudication and the other *Collyer* criteria are met, the policies underlying *Collyer* counsel against allowing the complaining party to avoid using that procedure.'' Ibid (emphasis in original text).

I note, however, that, unlike this case, *Busch* involved parties who were already bound to a current labor agreement containing grievance-arbitration machinery, i.e., they had a ''contractual grievance procedure.'' And the Board itself apparently saw this as critical, for it was because the parties had an ''existing contract'' in *Busch* that the Board distinguished *Arizona Portland Cement Co.*, 281 NLRB 304 fn. 2 (1986), the case the administrative law judge had relied on to deny the Employer's deferral motion. Thus, regarding *Arizona Portland Cement*, the Board said in *Busch*: ''In that case the Board declined to defer, not because of the absence of binding language in a grievance-arbitration clause, but because of the absence of an existing contract.'' Supra at 715.

Considering this, I judge that the holding in *Busch* cannot plausibly be extended to situations like this one, where an employer, in the absence of a current labor agreement, has unilaterally made ''available'' a grievance-arbitration mechanism for resolving disputes. For to so extend the *Busch* holding would inevitably collide not just with the central rationales of *Collyer* and *United Technologies*, supra (by deferring, the Board is merely ''holding the parties to their bargain''), but with the Board's and the Supreme Court's consistent teachings that the Board cannot compel (or ''adjure'') parties to a bargaining relationship, absent their agreement, to submit disputes to arbitration. See, e.g., *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970), citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). (''Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'') See also *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991). (''We reaffirm today that under the NLRA arbitration is a matter of consent, and that it will not be imposed upon parties beyond the scope of their agreement.'')

Accordingly, I deny NASSCO's renewed motion to defer, and I will proceed to consider and decide the statutory merits of the cases under submission.

Summary of Main Findings

I have studied the whole record, and, as well, the parties' briefs[8] and the authorities they invoke. Based on details narrated in succeeding sections,[9] I find in summary as follows:

On October 1, 1992, on the expiration of their most recent labor agreements, the seven Unions who represented the nearly 2900 hourly paid workers NASSCO then employed at its San Diego shipyard, called a common strike in support of their new contract demands, but called off the strike 3 weeks later, under the terms of a back-to-work agreement

[8] Candid and helpful briefs were submitted by the General Counsel (46 pages) and by counsel for NASSCO (200 pages) on or before the extended deadline of January 17, 1995.

[9] Considerations of witness demeanor will affect only a small number of my findings and characterizations. Unless I note otherwise, all factual details narrated in succeeding sections are undisputed.

with NASSCO which did not resolve the underlying contract dispute. In latter February 1993, following more months of bargaining and the Unions' recent rejection of NASSCO's ''last offer,'' NASSCO implemented the terms of that offer.

Faced with these developments, the Unions, led by top agents of the Ironworkers and the Machinists, who dominated the seven-union coalition, adopted an ''Inside-Game'' strategy. This strategy was calculated to avoid the economic risks to employees (and the perceived institutional risks to the unions of possible decertification) of another forthright strike, but was still aimed at putting enough economic pressure on NASSCO to coax the Company into making a better contract offer than the one it had left on the table as its last offer.

To maintain and promote worker solidarity during this ''inside'' campaign, the Unions began on February 17 to conduct regular, noisy-but-peaceful rallies at shift-change time in an area of NASSCO-leased property outside gate 6, the main entrance through which most NASSCO employees—bargaining unit and nonbargaining unit alike—entered and exited the shipyard. NASSCO's captain of security, Hutchins, acting on orders, began to use tripod-mounted video and audio recording gear to conspicuously document these rallies. He usually did this from the roof of building 15, adjacent to gate 6, where two other, video-only security cameras had always been mounted and used to monitor the gate 6 area and nearby parking lot.

The Unions' rallies, while intended to promote solidarity during the ''inside'' phase of their ongoing struggle for an acceptable contract with NASSCO, were hardly the only tactical elements of the Unions' ''Inside Game.'' Rather, in furtherance of this strategy, the Unions induced and encouraged employees to conduct at least six, brief, but calculatedly disruptive strikes or other job wobbling actions akin to striking. In summary, these strikes, and NASSCO's reactions to each, occurred as follows:

1. On Monday, March 8, upward of 500 union-represented employees engaged in a 1-day ''sickout'' promoted surreptitiously by the Ironworkers, and perhaps other unions.[10]

Consistent with its ''Absence and Tardiness Control Program,'' and its ''Standard Rules of Conduct,'' NASSCO assessed two, ''no-fault'' attendance ''points'' against workers absent that day (such as Lopez, infra) who had not taken steps in advance to qualify their absences as ''excused'' absences. Under the simplest version of the more complicated and nuanced company program, a worker who gets more than 12 attendance points within any single 90-day period will be vulnerable to progressive discipline for each such accumulation—a written warning for the first accumulation, and a warning-plus-suspension for the second, and a dismissal for the third. NASSCO's assessment of points against presumed sickout participants on March 8 is not challenged by the complaint, and the General Counsel does not otherwise call them into question.

2. On Wednesday, March 17, the Unions conducted a lunchtime rally within the shipyard attended by 100-300 employees, a featured topic of which was NASSCO's recent announcement that, due to lack of profit in 1992, there would be no payout to employees under the Company's profit-sharing plan. As the final company ''chime'' signaled the end of the allotted lunch period at 11:45, a breakaway group of 40 to 60 participants in the rally, led by Peter Zschiesche (a Machinists agent who headed the seven-union coalition) and by top Ironworkers officers and at least 11 other union officials or shop stewards, marched to Production Foreman John Ball's office and demanded a meeting with NASSCO's president to discuss the no-profit/no-payout announcement. Despite directions from Ball and another supervisor at the scene that their gathering was ''illegal'' and that they must get back to work or face discipline, the breakaway group continued to demonstrate in front of Ball's office for almost exactly 30 minutes, assured by Zschiesche that their ''meeting'' was not a ''strike,'' and was ''protected.'' At 12:16, however, the shipyard workers among the group finally returned to their jobs, but only after Zschiesche had announced that he preferred to ''save'' any further job actions for ''another day.''

NASSCO's security captain, Hutchins, conspicuously used his video/audio recording gear to document the last 21 minutes of this in-plant demonstration, and the production foreman, Ball, also took some polaroid snapshots of the demonstrators. Again, consistent with its established programs, NASSCO assessed one attendance point against each of the workers whom it could identify as having returned tardy due to attendance at the after-lunch demonstration. One Ironworkers-represented participant, John Lopez, received such a point and was eventually terminated on June 16 (but then later reinstated without backpay in September). The one point Lopez had received for his tardy return on March 17 had a ''causative'' relationship, although attenuated, to his June 16 dismissal. Under unique circumstances, NASSCO further issued a 3-day disciplinary suspension to another March 17 demonstrator and tardy lunch returnee, Carpenters Shop Steward John Long. All of these actions by NASSCO are alleged in the complaint to involve violations of Section 8(a)(1), and the attendance points and disciplinary actions imposed on participants in the after-lunch demonstration are also alleged to have involved unlawful ''discrimination'' under Section 8(a)(3).

3. On Friday March 19, again following an all union rally in the shipyard at lunchtime, 10 electricians represented by the Electrical Workers refused to resume working in their common department. And this time, those workers went home for the balance of the day, making it clear, however, that they would return to work on Monday. Again, consistent with its established program, NASSCO disciplined the 10 electricians with 3-day suspensions for the distinct offense under published company rules of leaving the shipyard during working hours without permission.

4. 5. 6. Finally, as the contract bargaining impasse between the parties wore on, the Unions called a series of three, 1-day strikes—on April 29, May 17, and June 23—which the General Counsel stipulated were statutorily unprotected, ''intermittent'' strikes, commonly aimed at pressuring NASSCO to make further concessions at the bargaining table.[11]

[10] I grant NASSCO's motion on brief (Part One, p. 21, fn. 21) to correct the trial record at Tr. 420:8 by substituting ''sick-outs'' for ''stick-ups,'' which latter conduct, as NASSCO concedes, was not a feature of the Unions' ''inside game.''

[11] Although none of the Charging Party Unions joined in this stipulation, the General Counsel controls the theory of the prosecution;

It vaguely appears from the record that NASSCO assessed attendance points or imposed additional discipline against participants in these 1-day strikes. If so, however, the prosecution makes no claim that any such points or discipline were unlawfully imposed.

Governing Principles; Main Conclusions

The Act we administer shows ''repeated solicitude'' for the right of employees to strike. *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 233 (1963). This solicitude is not limited to conventional strikes called by unions in aid of collective-bargaining demands; it also embraces work stoppages (especially ''one-time'' stoppages) done by employees (especially employees who have no union representation) for the purpose of manifesting their genuine (or ''good-faith'') objections to a term or condition of employment. *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 15–17 (1962).[12] Many of the cases emphasizing these principles involved short-term stoppages conducted by unrepresented employees to protect themselves from or to protest what they honestly believed to be a uniquely unsafe or unhealthy condition in the shop or at the construction jobsite.[13] But Section 7's protections clearly extend, as well, to strikes or other concerted stoppages done to protest matters unrelated to ''safety'' concerns—the employer's unwelcome overtime regime, for example,[14] or its imposition of a ''heavy workload,''[15] or the setting of ''inconsistent work schedules'' by different supervisors,[16] or even the ''disarray'' at the employees' ''work site.''[17]

But this statutory solicitude is not unlimited. We are also taught that when employees, or the unions who lead them, seek to bring about a ''condition'' that involves ''neither strike nor work,''[18] the employees lose Section 7's protections, especially when they use ''intermittent work stoppages,'' or their equally unprotected kin, ''partial strikes,'' as tactics to achieve such a quasi-strike ''condition.''[19] A notion of economic ''fair play'' under our statutory scheme seems to inform these holdings. Thus, the Board has consistently reasoned that, unlike a protected, ''unequivocal'' strike done to further some work-related protest, such quasi-strike activities should be regarded as beyond Section 7's protections because they involve at their essence an attempt by employees to reap the economic benefits of strike action without their being simultaneously willing ''to assume the status of strikers, with its consequent loss of pay and risk of being replaced.''[20] Another explanation for the ''repeated condemn[ation]'' delivered by ''[b]oth the Board and the courts'' against such less-than-''complete'' strike activities appears to be grounded in the notion that they involve a kind of worker insubordination, i.e., a ''refusal to work on the terms lawfully prescribed by the employer while remaining on their jobs.''[21]

Despite the usefulness of these contrasting teachings as outer guidelines for analysis, the precise location of the line between ''protected'' concerted work stoppages and unprotected stoppages, no matter how ''concerted,'' remains a notoriously elusive and difficult one to discern and define. The many decided cases in this area seem to turn on their pecu-

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that is, he has the ''authority to frame the case'' (*Maintenance Service Corp*., 275 NLRB 1422, 1425–1426 (1985)), and as part of that authority, the General Counsel may preclude litigation of claims by charging parties that are inconsistent with that theory. See generally *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981, 982 (1992), and authorities cited. Therefore, I judge that the General Counsel's stipulation was sufficient to preclude any claim that the three, 1-day strikes were anything other than unprotected, ''intermittent'' strikes in aid of contract aims. Moreover, substantial, undisputed evidence in the record relating to the three strikes shows clearly enough that this was the case, and one example suffices to make the point: Zschiesche, the chair of the seven-union coalition, announced to the local news media during the first of the 1-day strikes, on April 29, that ''there's going to be more of this in weeks to come unless we can get a better contract.'' And, in fact, there was ''more of this in weeks to come,'' specifically, on May 17 and June 23. Accordingly, on this record, I would easily reach the same conclusion that the General Counsel saw fit to stipulate to.

[12] See also e.g., *Polytech, Inc*., 195 NLRB 695, 696 (1972), and *Tamara Foods, Inc*., 258 NLRB 1307, 1308 (1981), enfd. 692 F.2d 1171 (8th Cir. 1982), cert. denied 461 U.S. 928 (1983), each case emphasizing that the employees were unrepresented, that they stopped work based on ''good-faith'' concerns, and that the stoppage was a ''one-time'' event.

[13] The seminal case in this line is *NLRB v. Washington Aluminum Co*., supra. See also e.g., *Union Boiler Co*., 213 NLRB 818 (1974); *Brown & Root, Inc*., 246 NLRB 33 (1979); *Service Machine & Shipbuilding Corp*., 253 NLRB 628 (1980); *Tamara Foods, Inc*., supra; *Colorado Forge Corp*., 260 NLRB 25 (1982); *J. T. Cullen Co*., 271 NLRB 114 (1984); and *McEver Engineering*, 275 NLRB 921 (1985).

[14] See, e.g., *First National Bank of Omaha*, 171 NLRB 1145 (1968), enfd. 413 F.2d 921 (8th Cir. 1969), and *Polytech*, supra at 696.

[15] *Robertson Industries*, 216 NLRB 361 (1975).

[16] *Mike Yurosek & Son, Inc.*, 310 NLRB 831 (1993).

[17] *VEMCO, Inc*., 314 NLRB 1235, 1240 (1994), enf. denied in relevant part 79 F.3d 526 (6th Cir. 1996).

[18] *Pacific Telephone & Telegraph Co*., 107 NLRB 1547, 1549 (1954).

[19] See generally *NLRB v. Insurance Agents Union*, 361 U.S. 477, 492–494 (1960), and *Auto Workers Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949). See also e.g., *John S. Swift Co*., 124 NLRB 394, 396 (1959), enfd. 277 F.2d 641 (7th Cir. 1960); *Polytech, Inc*., supra at 696; *Lake Development Management Co*., 259 NLRB 791 fn. 4 (1981); *Embossing Printers*, 268 NLRB 710, 723 (1984); *Audubon Health Care Center*, 268 NLRB 135, 137 (1983); and *Highlands Medical Center*, 278 NLRB 1097 (1986).

[20] *First National Bank of Omaha*, supra at 1151. See also e.g., *Shelly & Anderson Furniture Co. v. NLRB*, 497 F.2d 1200, 1203 (1974); *Polytech, Inc*., supra at 696; and *Embossing Printers*, supra at 723.

[21] *Highlands Medical Center*, supra at 1097, and authorities cited. See also *Gulf Coast Oil Co*., 97 NLRB 1513 (1952). (Employees reported 3 hours late to work due to attendance at union meeting—action denounced by the Board as ''an unwarranted usurpation of company time by the employees to engage in a sort of union activity customarily done on nonworking time.'') And see *Audubon Health Care Center*, supra at 137:

> While employees may protest and ultimately seek to change any term or condition of their employment by striking or engaging in a work stoppage, the strike or stoppage must be complete, that is, the employees must withhold all their services from their employer. They cannot pick and choose the work they will do or when they will do it. Such conduct constitutes an attempt by the employees to set their own terms and conditions of employment in defiance of their employer's authority to determine those matters and is unprotected. [Citations omitted.]

liar facts, and thus the potentially vast range of ''different'' facts inevitably presented in each new case can often provide fertile ground for arguing for the application of either of the contrasting rationales summarized above. Indeed, as the Ninth Circuit observed, describing a different area of law, ''[t]here is more than enough scripture upon the subject to enable any devil to cite some of it for his purpose.''[22] Moreover, determining whether or not a work stoppage is or is not protected will frequently require inquiry into the bona fides of the ''protest'' stoppage in question, i.e., inquiry into the motives of the workers who participate in the stoppage.[23] And such an inquiry is especially appropriate here, where the allegedly ''spontaneous'' work stoppages of March 17 and 19 occurred within a period when the Unions were promoting the use of ''inside'' tactics which, as the General Counsel concedes, included a series of unprotected intermittent strikes. (Thus we are effectively asked to decide whether, as the General Counsel insists, the workers in each of those stoppages were engaged in ''spontaneous,'' ad hoc ''protests'' genuinely grounded in recent ''changes'' at their workplace; or whether, as NASSCO insists, they were simply bent on wobbling the job in support of the Unions' ''Inside-Game'' strategy.) In addition, where in this case we are presented with the phenomenon of at least one ''in-plant'' work stoppage (on March 17), the line-drawing task may be complicated further by our duty to ''balance'' competing interests—on the one hand, the employees' recognized interest in conducting a work stoppage to protest a genuine source of grievance, and on the other, the employer's recognized interest in controlling its property and managing its employees while on the property during hours set aside for work.[24]

However, if there exists in the smorgasboard of decided cases a single, bright-line statement to guide my disposition of most of the issues raised by the constellation of facts in this case, I think it may be found in the Board's recent dicta in *United States Service Industries*, 315 NLRB 285 (1994), affirming as follows:

> The judge stated, and we agree, that ''hit and run'' strikes engaged in as part of a planned strategy intended to ''harass the company into a state of confusion'' [quoting *Pacific Telephone*, supra, 107 NLRB at 1548] are not protected activity.

For reasons that I trust will be largely obvious in the light of details yet to be recorded, I have found in summary that the March 17 and 19 work stoppages were, indeed, union-orchestrated tactics in a contract-bargaining game plan contemplating other unprotected intermittent or partial strike activity, or threats thereof, calculated not only to ''confuse'' NASSCO, but to damage it economically and thereby to achieve the ''benefits'' of strike action without assuming the vulnerabilities of a forthright and continuous strike. This is another way of saying that the two March stoppages were integral elements of a union ''plan'' or ''strategy''[25] involving precisely the kinds of hit-and-run strike tactics denounced by the Board in *U.S. Service Industries*, supra. And because I have found that the two March stoppages were elements of this unprotected pattern of action, I conclude that the March stoppages were themselves unprotected, no matter that either might have been protected as a bona fide ''protest'' if either had occurred in isolation, or in the absence of such a strategy.[26] I judge, therefore, that when NASSCO, consistent with its established programs, assessed attendance points against or otherwise disciplined participants in those March stoppages, and when it admittedly threatened to discipline others who engaged in similarly unprotected activities, its actions did not implicate Section 7 rights and thus did not violate Section 8(a)(1) or (3).

For related and additional reasons, I conclude that NASSCO's use of audio/video and still-photo equipment to ''document'' the unprotected in-plant work stoppage on March 17 and to identify its participants did not implicate employee's rights under Section 7, and did not violate Section 8(a)(1). However, after considering all of the many other facts and circumstances, both remote and contemporary, that NASSCO has invoked to justify its admitted use of similar gear to similarly ''document'' peaceful, protected union rallies at gate 6 in the spring of 1993, I judge that NASSCO has not carried the burden of ''solid justification'' imposed

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[22] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 469 (9th Cir. 1966), acknowledging Shakespeare's contribution.

[23] See, e.g., *Daniel Construction Co. International*, 267 NLRB 1213 (1983), where two employees refused to work on a scaffold that they claimed was unsafe; but the judge found, and the Board agreed, that the workers ''did not have, nor could they have had, an honestly held belief or thought that their working conditions were unsafe.'' Id. at 1221–1222. Cf., e.g., *Colorado Forge Corp*., 260 NLRB 25 (1982). (Contrary to employer's claim that the employees' protest was unprotected because it was ''nothing more than a bad-faith attempt to harass their employer,'' the judge found, and the Board agreed, that ''the record evidence clearly establishes that the source of the employees' concerns were conditions on the job which they, in good faith, legitimately believed to be dangerous.'')

[24] See, e.g., *Cambro Mfg., Co*., 312 NLRB 634 (1993), adopting the summary of the legal framework governing in-plant work stoppages set forth in *Molon Motor & Coil Corp. v. NLRB*, 965 F.2d 523 (7th Cir. 1992), as follows:

> Not every work stoppage is protected activity, however; at some point an employer is entitled to assert its private property rights and demand its premises back. The line between a protected work stoppage and an illegal trespass is not clear-cut, and varies from case to case depending on the nature and strength of the competing interests at stake. See *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976); *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956).
>
> Drawing that line requires courts to balance ''whether the means utilized by the employee in protesting, when balanced against the employer's property rights, are entitled to the protection of the Act.'' *Peck, Inc*., 226 NLRB 1174, 1775 (1976) (Member Penello concurring); compare *Golay & Co. v. NLRB*, 371 F. 2d 259, 262 (7th Cir. 1966) (work stoppage protected because employer refused to discuss the matter and hastily discharged the workers without any warning to leave the property), cert. denied 387 U.S. 944. [Further collection and discussion of cases omitted.]

[25] In *U.S. Service Industries*, supra, the Board apparently used the technically redundant expression, planned strategy, for rhetorical purposes of emphasis. On this assumption, the Board's expression can be understood just as easily as referring to a ''plan'' *or* ''strategy.''

[26] Cf. *Mike Yurosek & Son*, supra, 310 NLRB at 831:

> . . . the refusal to work was not part of an intermittent work stoppage. The employees refused to work the extra hour on only one occasion. There was no indication that the employees' refusal was one of a series of intermittent strikes. See *Polytech, Inc*., 195 NLRB 695, 696 (1972).

on it by the controlling cases.[27] Therefore, I conclude that NASSCO violated Section 8(a)(1) in such instances, more particularly described later in this decision. In addition, I conclude that NASSCO violated Section 8(a)(1) by introducing in late October and maintaining thereafter in various forms a new security camera system at gate 6, one introduced, in part, to allow NASSCO to monitor—and, at its discretion, to record—peaceful protected rallies the Unions had begun again to hold at gate 6 in and after late September.

SUPPLEMENTAL FINDINGS, ANALYSES, AND CONCLUSIONS

I. GENERAL BACKGROUND

A. *Company Operations; Labor Relations Framework and History; Some Main Actors*

NASSCO builds, overhauls, and repairs ships in a shipyard occupying 110 acres of waterfront property in San Diego leased from a local port authority. The United States Navy has always been one of NASSCO's principal customers, and perhaps its mainstay. NASSCO's shipbuilding and repair contracts with the Navy contain certain ''plant protection'' requirements; these cover not just the kinds of ''safeguards'' (''including personnel, devices and equipment'') associated with ''peacetime conditions,'' but also, ''such additional safeguards as may be required . . . for the protection of its plant and the work in process . . . against espionage, sabotage, and enemy action.'' At material times Richard Vortmann was NASSCO's president, Fred Hallett was its vice president and chief financial officer, and Carl Hinrichsen was NASSCO's ''Manager of Industrial Relations,'' in charge of a staff that included Elwood (''Woody'') Breece, Eugene Pittman, and Steve Workman. In addition, Eugene Hutchins (familiarly known throughout the shipyard as ''Captain Hutch,'' or, simply, ''Hutch'') was NASSCO's ''Captain of Security Operations,'' responsible for most of the ''surveillance'' equipment and activities discussed in later sections.

In recent years NASSCO has employed between 2000 and 3000 hourly paid workers, depending on the amount of work in the shipyard. (In the early 1980s, the total was closer to 6000; during material periods in 1993, the total was nearly 2900.) These hourly employees are divided for collective-bargaining purposes into seven separate units, each represented by a different labor organization, among which are the four Charging Party Unions here. The Ironworkers represent the majority of these employees—about 55 percent. At material times, the Ironworkers were led by Robert Godinez, the full-time business agent and financial secretary, and Tom McCammon, a longtime NASSCO employee who has worked full time for the Ironworkers since 1989 in his dual capacities as elected president and chief shop steward.[28] In addition, the Ironworkers had about 30 shop stewards who worked on NASSCO's payroll in various shipyard departments. The Machinists, led at material times by full-time Business Representative Peter Zschiesche, represent another 20 to 30 percent of the hourly workers. The remainder are represented in relatively smaller units by the Electrical Workers or the Carpenters, or by one of three other unions who did not file charges here—the Painters, the Operating Engineers, and the Teamsters.

For an uncertain number of years, perhaps decades, those Unions have coordinated their collective bargaining with NASSCO under the framework of a confederation called the ''Seven Shipyard Unions'' (Seven Unions, when referring to the formal entity). The Machinists' Zschiesche was the ''Chair'' of the Seven Unions at all material times in 1992 and 1993, and, without regard to the letterhead he wrote under, he usually purported to speak for all of them in various communiques to NASSCO, or its employees, or the Navy, or the local news media.

Since 1980, the parties to this coordinated bargaining arrangement have concluded three successive labor agreements (more precisely, three successive sets of separate contracts between NASSCO and each Union, each set having common starting and termination dates). That same period has been an often stormy one for the parties, however, for strikes of about 3 weeks' duration—each attended by a certain amount of picket line misconduct and/or related vandalism—had preceded each of those eventual agreements. In addition, the relationship between the parties since 1980 was disturbed by periods of tension and labor strife falling outside the weeks when new contract strikes were occurring. For example, the strike that ended when the parties reached their 1981–1984 agreements was itself preceded by a cascading series of job actions in the spring and summer of 1980, during the terms of predecessor labor agreements containing no-strike clauses. (As further described elsewhere, these 1980 actions included a 1-day sickout, a 3-day wildcat strike that shut down the shipyard, and several, in-plant ''takeover'' actions, some involving vandalism or violence by groups of workers.) And the strike preceding the agreements that eventually replaced ones that had expired on September 30, 1987, did not begin until August 1988, following a roughly 11-month contract hiatus period during which the employees had stayed on the job, while the Unions orchestrated what the Ironworkers' Godinez referred to (in a March 16 flyer, infra), as the ''old inside game,'' to be distinguished from the ''new inside game,'' the label Godinez adopted to describe the new wrinkles on the old game that the Unions had recently developed to deal with the contract stalemate in and after late February 1993.

B. *The Theory of the ''Inside Game''*

Although I will record further details in later sections, there is no dispute that the Seven Unions, having previously abandoned a strike in October 1992 called in aid of new contract demands, had decided by late February 1993 not to call another strike, even though months of inconclusive bar-

[27] See *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), and authorities cited . See also e.g., *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1050 (1994), and authorities cited.

[28] Although McCammon roves the shipyard daily in his capacity as the Ironworkers' chief shop steward, he admittedly performs no work with the tools. It appears from the record that NASSCO had traditionally paid McCammon as a full-time employee, but had discontinued that practice in late February, as part of its implementation of its last offer. (See John Long's account on cross-examination of March 17 events at the ''sandpit rally,'' and his related acknowledgment that NASSCO had recently discontinued a previous practice of paying stewards, including McCammon, for time they spent during working hours on ''union business.'')

gaining had intervened, and despite the fact that in late February NASSCO had implemented its last offer. Instead, the Unions opted to have the workers stay on the job and take ''inside'' measures designed to put economic pressure on NASSCO to change its position at the bargaining table. Thus, Zschiesche, Godinez, and McCammon admitted—in broad terms, at least—that the Seven Unions had decided in and after February to pursue a strategy known to them over the years as the ''Inside Game.'' And Godinez acknowledged more specifically that he and the Seven Unions leadership had exhorted workers during both the 1987–1988 and the 1992–1993 bargaining struggles to play the ''inside game.'' However, apart from occasionally making generalized references to a ''work-to-rule'' program,[29] those same union witnesses exhibited a nearly uniform resistance bordering on stonewalling when invited to identify what specific actions they contemplated or practiced as part of their decision in late February to resort to an inside-game campaign in lieu of a forthright strike. Indeed, the most specific *public* statements Godinez is known to have made on this subject were not uttered from the witness chair, but were written in his February 16 flyer to shipyard workers, infra, and even then, his statements are notable more for their artful vagueness than for their specificity. Thus, in that flyer, Godinez said that this campaign would involve not just ''work-to-rule'' measures, but also certain (undefined) ''in-plant solidarity activities and other forms of resistance calculated to cause enough economic damage to make a concession-demanding Company reconsider.''

In thus embracing an ''inside'' campaign intended to do ''economic damage'' to NASSCO, the Unions were admittedly pursuing and adapting a strategy suggested in an 83-page booklet published in the mid-1980s by the AFL–CIO, the central, national labor body with which all the shipyard unions were affiliated. This booklet, a copy of which was received into evidence on the General Counsel's tender, bears the title, ''THE INSIDE GAME: WINNING WITH WORKPLACE STRATEGIES.''[30] Zschiesche acknowledged that the Machinists had distributed copies of this booklet to its members in ''1987–1988.'' And Godinez further acknowledged more generally that the Unions had distributed copies to employees both in 1987–1988 and in 1992–1993. Indeed, Godinez claims to have used the language in the AFL–CIO booklet as the model for most of his 1993 flyers, infra, and he admittedly recommended the booklet itself as a ''good book'' in a ''confidential'' flyer he prepared on March 16, infra (i.e., on the eve of the March 17 work stoppage, infra, which the General Counsel would have me find was an ''independent'' or ''spontaneous'' action by outraged rank-file-workers). In that March 16 flyer, Godinez had also written pertinently that,

> The ''Inside Game'' is nothing new; . . . it is a method that doesn't get much publicity. The reason it's *not* publicized is not because it's not effective—but because it works better under cover. . . . [And] coupled with a strike, it works *even better*!

Because the AFL–CIO booklet clearly informed the thinking and behavior of key union actors in central events, and because their actions described below in many ways clearly mimicked or echoed tactics suggested in the booklet, I think the booklet itself deserves further introductory review:[31]

The authors of the booklet explain in an opening section that the booklet ''explores the use of tactics within the workplace,'' and serves as ''a guide to organizing workers to fight on their own behalf where they work[.]''[32] The authors further explain that, whereas in the past, ''the strike was the most effective weapon in the arsenal of any labor union[,]'' more recently, the ''rules'' had changed, and employers had been ''encouraged by the climate created by the Reagan Administration . . . to construct game plans that turn the strike weapon against the . . . workers[,]'' i.e., by intentionally conducting their bargaining so as to provoke a strike, and then by ''replac[ing] the striking workers with scabs[,]'' who, the authors presume, will eventually vote to ''decertify'' the union. And the authors conclude their introductory section with these words:

> when an employer begins trying to play by the ''new rules'' and actually force a strike, *staying on the job and working from the inside* may be more appropriate and effective.

In a chapter devoted to ''PLAYING THE INSIDE GAME,'' the authors suggest that it is ''best'' to ''establish an active *Workplace Organizing Committee*, a team of rank-and-file workers who function as an expansion of the normal union negotiating team, and work from the inside to agitate and pressure the employer prior to and during the bargaining process[,]'' and a team, moreover, that is composed of at least some members who are ''recruit[ed] because of the 'key' positions they hold or the jobs they do.'' The authors instruct that, ''[b]y the time actual bargaining starts, the Workplace Organizing Committee should be completely in place and activated.'' In the same chapter, the authors stress that, with such a rank-and-file committee in place, it will be up to ''the union'' to ''out-think the employer through strategies that keep the employer off balance and on the defensive.'' The authors then identify ''three ways to do this,'' namely, ''*demonstrations of solidarity, object lessons for management* and *public bargaining*.''

[29] No one claims that the March 17 and 19 job actions were aspects of a work-to-rule campaign, and for reasons noted in due course, no one could plausibly make such a claim. And I do not find it necessary in deciding the issues raised by the complaint to judge whether, or to what extent, any other tactics envisioned or practiced by the Unions under the rubric, work-to-rule, were protected by Sec. 7.

[30] Copyright 1986, Industrial Union Department (AFL–CIO), Washington, D.C.

[31] This review is intended to confine itself to messages and themes in the booklet that I think help illuminate the shipyard unions' motivations for specific actions taken during material periods. I emphasize, however, that I do not propose to ''review'' the booklet in the sense of evaluating the wisdom of its authors' recommendations or the accuracy or adequacy of their summaries of the state of the law concerning what kinds of concerted employee activities are protected by Sec. 7 and what kinds are not.

[32] In quoting from the booklet, I have retained all spellings, capitalizations, punctuations, and various forms of emphasis as they appear in the original document. The same will be true of other quotations, infra, from other union flyers and publications of record.

Within the section devoted to ''Demonstrations of Solidarity,'' the authors recommend that, ''Informational Picketing . . . should take place on an intermittent basis at symbolic locations (so the employer thinks each time it is a strike) and it should include a large number of worker families as well as supporters from other unions and the community.''[33] They also suggest the holding of ''Daily Rallies before work begins,'' at which time ''members of the Workplace Organizing Committee should gather in some symbolic spot to sing a union song and hear a short speech[.]'' And under the topic, ''Object Lessons for Management,'' the authors note that, ''the entire flow of bargaining [may be] altered in favor of the union, by the staging of periodic actions that have real impact.''

One example of such a ''periodic action'' given extended treatment in the booklet is a ''Work-to-Rule '' campaign. But other examples of actions that likewise ''have real impact'' are at least as clearly suggested in allegorical form by a cartoon appearing on the same page: It depicts a cigar-puffing tycoon staring gloomily at a chart showing a sharp drop-off in his factory's production, as his aide informs him that, ''EIGHTY-THREE PEOPLE CALLED IN SICK, NOBODY WILL WORK OVERTIME, THE PHONES ARE JAMMED AND MISS HADLEY REFUSES TO WALK YOUR DOG.''

Many of these themes are recapitulated and elaborated in later chapters of the booklet, often through similar allegorical devices. For example, the central message of one chapter, captioned, ''ALTERNATIVES TO STRIKING,'' seems best captured by the cartoon that appears on its opening page: In that drawing, our tycoon is now seen in his lawyer's office, hunched over his cigar in frustration, as his attorney pronounces, ''MY CONSIDERED LEGAL OPINION IS THAT WHAT WE HAVE HERE IS A STRIKE THAT ISN'T A STRIKE BUT JUST LOOKS AND FEELS LIKE A STRIKE.'' This cartoon is followed by several paragraphs, one of which notes that,

> Rather than play into the employer's hands in this way [i.e., by going on strike and risking replacement by ''scabs'' who will eventually vote to decertify the union], some unions are choosing to continue bargaining and continue working *without a contract*. It's a choice that goes against the traditional instincts of most union workers, but one which can bring great pressure on an employer when coupled with internal pressure tactics.

Warming to the point, the authors state in a related paragraph that, in the absence of a contract with a grievance-arbitration procedure, ''workers often *must* rely on 'concerted activities' in order to resolve disputes[,]'' and they note that when such a dispute arises, it presents ''a great opportunity to demonstrate to management that *having* a contract is far better than not having one.'' Thus, the authors suggest that a ''Dispute Committee'' be formed to ''train workers to recognize disputes[,]'' and that, ''[o]nce disputes have been identified, one way to present them is for several workers to make it known that they are leaving their work stations to meet with management[,]'' and then ''walk together to their supervisor's office to insist on discussing their problems and on being represented by their Dispute Committee.'' This is a process, so the authors observe, ''that can take hours of negotiation.'' The authors add that, ''[r]esolving disputes in this manner is in many cases a legal and protected activity[,]'' and they direct the reader's attention to ''Appendix V'' of the booklet, which addresses the ''Legal Aspects [of] Concerted Activity Protections.''

In this ''Legal Aspects'' appendix (which contains no specific case citations), the authors summarize the holdings of several Board or court cases presenting the issue of whether or not certain kinds of job actions enjoy the Act's protection. The authors state, for example, that, ''generally, a one-time strike of short duration to protest some employment-related matter is protected unless done in bad faith.'' They illustrate the point by describing a Board case in which the employer was found to have unlawfully discharged employees who had left work one evening to protest what they felt was excessive overtime. The authors further note, however, that, ''[t]he line between such a protected protest and a mere refusal to work overtime where it is required by the employer, which may be unprotected insubordination, is an elusive one.'' And they counsel in a concluding sentence that,

> The more the activity looks like a protest walkout, the more likely it will be held protected.

II. RECENT HISTORY: CONTRACT STALEMATE; UNION ANNOUNCEMENTS; COMPANY COUNTERMEASURES

On September 30, 1992, following at least 30 prior bargaining sessions, the most recent of the agreements reached by NASSCO and the Seven Unions expired, without any prospect for a new set of contracts. The next day, the Seven Unions called a strike, but many workers crossed their picket lines, and NASSCO continued operating with nonstriking employees and nonunit supervisors and managers. This strike ended with a back-to-work agreement on October 25, 1992, after NASSCO threatened to hire permanent replacements for the strikers. Under the back-to-work agreement, the Unions and NASSCO exchanged no-strike and no-lockout pledges that were originally due to expire in early January, but the parties eventually extended those pledges through February 21, while federally mediated bargaining continued between them.

On February 16, with prospects for a new labor agreement still dim, flyers signed by Godinez and printed under the Ironworkers' letterhead were distributed at the shipyard. One of them found its way to the Company's industrial relations offices the same day. The one-page flyer, addressed to ''Brothers and Sisters,''[34] dealt nominally with two topics: It urged first that the workers give support to an Ironworkers-favored candidate for a local City Council position; it then addressed the subject of ''Starting and Quitting Time.'' This is what Godinez said under that topic heading:[35]

[33] In this regard, the authors advise that ''pickets should be staged as creatively as possible: babies in grocery carts always change the impact of an informational picket.''

[34] It appears that this flyer, like other Ironworkers' flyers, infra, was distributed to employees generally—and not simply to the 1500 or so workers represented by the Ironworkers—as they entered or left the shipyard at shift-change times.

[35] Godinez implied in some of his testimony that some or all of the writings he signed were actually composed, in whole or part, by others. Nevertheless, here and in cases of other flyers and written communications below, I will treat the signer as the author.

> The Company has recently handed out a piece of paper that claims workers should work until the 3:25 P.M. whistle. We have researched that rule and find that on January 16, 1979, Devon Smith, the Company's Labor Relations Manager, made exceptions to the five-minute rule as he realized that certain classifications, such as Pipe Welder, required more than five minutes to put away equipment.
>
> Since exceptions exist as part of the rule, and since the personal responsibility for added tools and equipment has increased during the years, we must ask that everyone whom this rule affects in an unreasonable manner to file a pay grievance in any instance that you were kept beyond the end of the shift. (i.e.: 3:30 p.m. or 12:30 a.m.)
>
> Union Solidarity comes in many different methods, such as **work-to-rule, strikes, in-plant solidarity activities and other forms of resistance calculated to cause enough economic damage to make a concession-demanding Company reconsider**. See your Shop Steward or Business Agent for details.[36]

In addition, there appeared on this flyer a three-panel cartoon. In the first panel, our familiar tycoon-with-cigar is now working on his golf-putting technique in his executive suite, which overlooks the smokestacks of his factory. In the second panel, the entire suite shudders as though from a rumbling below, and the tycoon's putt is disturbed. In the third panel, the bewildered boss demands of an empty room, ''WHAT IN **blazes** WAS THAT?!'' HE IS ANSWERED BY A VOICE ON HIS DESK INTERCOM SET, SAYING, ''IT WAS THE WORKERS, SIR. THEY'RE PUTTING THE MOVEMENT BACK IN THE LABOR MOVEMENT.''

The next day, February 17, copies of another flyer on Ironworkers' letterhead appeared in the shipyard, again signed by Godinez,. (It was again addressed to ''Brothers and Sisters,'' but its text, infra, clearly suggests it was intended for a larger audience, including, but not limited to, ''the Navy.'') This flyer announced a ''***UNION SOLIDARITY RALLY[;] 3:30 P.M. TODAY, Gate #6***.'' (The reference to ''Gate #6'' is to a main shipyard entrance on NASSCO-leased property where the Unions had often held rallies and demonstrations in association with past contract struggles and strikes, always within the sight and hearing range of the main guard shack at the entrance, and within the viewing range of security video cameras known to be monitoring the gate 6 area from atop the adjacent ''Building 15.'') Above that announcement, Godinez had written pertinently as follows:

> We are currently working under a return-to-work agreement that expires at midnight, February 21, 1993. Your negotiating committee will continue to meet with Nassco; but if your committee cannot come up with an agreement we can recommend, then be prepared to take whatever labor action necessary to bring Nassco to the table with a decent Labor Contract.
>
> We caution the Navy that has ships at Nassco to be fully aware that since Nassco is trying to *take* so much from the workers, the workers will probably walk off the job on Monday, February 22, 1993 or any day after.
>
> [Paragraph listing objectionable ''takeaways'' proposed by NASSCO omitted.]
>
> Once again, we caution the Navy to be alert and watch very carefully who welds on its ships; because, if the workers walk off the job, the Company's salaried personnel are not certified to weld. During our last ''Strike'' in October Nassco spent two weeks training and certifying some people to weld . . . but that was *more than 90 days ago*, and by Navy weld standards those salaried personnel are no longer allowed to weld. They must be retested and certified.

It was on February 17, apparently, that the Seven Unions began to conduct regular ''Solidarity Rallies'' before or after work at gate 6, the site of many similar union rallies during prior contract struggles. In these rallies, which continued into June, the union leaders (typically, Godinez, McCammon, and Zschiesche, joined regularly by business agents and stewards from the other Unions, as well) would use electronic bullhorns to make speeches and to exhort attendees and passing-by workers to demonstrate their solidarity. A typical—and innocuous—example was the message during morning rallies that union workers should not enter the yard until 6:40 a.m., 5 minutes before the scheduled start of the shift, and then go in en masse, shouting slogans, such as, ''It's Union time!''—intended to be heard in the Company's industrial relations offices located in building 1 (also known as the ''I/R'' or ''Administration'' building), adjacent to gate 6 on the opposite side from building 15. These gate 6 rallies also became the occasion for much playing to a portable video camera with a boom microphone attachment used regularly by Security Captain Hutchins in and after early March for the specific purpose of recording the gate 6 rallies, usually from atop building 15. Thus, employees and union agents would often wave to Hutchins' camera, or shake clenched fists, or use bullhorns or shouts to address messages to ''Dick'' (Vortmann), NASSCO's president, presumed to be an avid viewer of Hutchins' tapes.

On February 19, with the bargaining parties still at impasse on important issues, the Seven Unions conducted a ''ratification'' vote among their members on NASSCO's last offer. Only about 25 percent of the represented workers (720 out of nearly 2900 then employed) showed up to vote; 57 voted to accept the Company's offer and 663 voted to reject it. NASSCO soon announced that it was implementing its last offer in all its particulars. Despite this, the ''probabl[e] walk off'' threatened in the Ironworkers' February 17 flyer to begin on ''February 22 . . . or any day after'' did not materialize. Instead, on or about February 21 or 22, an unsigned flyer under the name and logos of the Seven Unions was distributed at the shipyard. It announced that the members had

[36] Pertinent to this final sentence, and more generally to the events discussed hereafter, Godinez made a variety of admissions during cross-examination which, in the aggregate, cause me to find in summary as follows: The Ironworkers assumed that copies of their flyers would soon get in the Company's hands, and for this reason did not announce details of their plans in those flyers (nor during ''open'' meetings at gate 6 or elsewhere on company premises). Rather, Godinez and McCammon would communicate those details (or anything else the Ironworkers ''didn't want the company to know about'') by word-of-mouth (or by handwritten notes) to the 30 or so Ironworkers shop stewards, who were expected to pass the word along to the rank-and-file workers during ''special-meeting'' get-togethers inside the shipyard.

''overwhelmingly rejected'' NASSCO's last offer. It further announced, however, that,

> The Seven Unions have decided to return to work on Monday, February 22 and build the struggle for our rights within the yard. Our struggle in the yard will take many forms of legal protected activity under federal law. We will strike when the time is right for us, not for the Company. Together we will win!
>
> Dick Vortmann's Feb. 18 letter sent to our members said that ''the foreman's evaluation *must not be arbitrary or capricious*.'' He claims that the evaluation system is ''*reasonable and fair*.'' Do you agree with Dick? If you don't you must ask your foreman for an interview and copy of your evaluation sheet. You must tell him or her between Monday and Wednesday each week.
>
> *You have a right to disagree with your weekly rating under Section 3.5 of the Progam's procedures. If you have any problems doing this, see your Shop Steward right away.*

Another cartoon appeared at the bottom of the Seven Unions flyer. It depicted three working people depositing ballots with emphatically negative remarks on them into a ballot box. Bracketing this cartoon were handwritten exhortations. One of them said, ''WITH ***union solidarity*** WE CAN WIN A BETTER DEAL.'' THE OTHER SAID, ''JOIN THE STRUGGLE INSIDE THE YARD—YOUR RIGHTS DEPEND ON YOUR ACTION.''

On February 26, apparently during a rally at gate 6, the Ironworkers distributed another flyer signed by Godinez, this one captioned, ''SHARK REPELLENT IS ***coming.''*** This flyer is stylistically noteworthy for its reliance on a metaphoric depiction of NASSCO's owners and management as ''sharks,'' sensing the workers' ''blood . . . in the water,'' and on the ''attack,'' and for the rather florid extensions of that metaphor adopted by Godinez to describe how ''the workers,'' acting ''in solidarity,'' would defend themselves—by ''brewing'' a ''repellent,'' one that would eventually ''boil over into a fragrance that makes the workers more active and militant[.]'' On a substantive level, the flyer is also noteworthy for its thinly-veiled exhortations to more concrete actions, couched in the form of confident predictions. Thus, Godinez wrote that the ''fragrance'' of this repellent brew would arouse workers to ''argue that their [weekly] evaluations are too low,'' and would give them the ''courage to meet with every level of management to get [their] ratings fixed,'' and would inspire them to ''***reject*** *all unsafe work assignments* and fight to make the yard safe.'' In the final passages, however, Godinez again waxed poetically vague as he envisioned coming events. Thus, he closed the flyer with this verse:

> Inhale we will, as the fragrance goes by. Can't wait for the full dose to make sharks cry.
>
> The sharks will flip, the sharks will flop, and sooner than later the attack will stop.
>
> The full dose repellent is soon to be here. Listen to the whistle as it will appear.

When a copy of this flyer got into the Company's hands, the closing doggerel penned by Godinez was deciphered by people in the industrial relations office as a call to the workers to get ready to deliver a ''full dose'' to NASSCO by stopping work whenever they heard the sound of a ''whistle.'' (In the shipyard, designated personnel, such as riggers, carry company issued whistles which they use to alert people within hearing range to a potential safety hazard—typically, a crane swinging a load of steel overhead. And when workers hear such a whistle, they are expected to stop work and remain observant of the hazard until it passes.) Thus, in response to what the Company saw as a coded threat that it would suffer job-disruptive or unsafe mischief at the hands of union-inspired whistleblowers, Hinrichsen published a bulletin to employees on March 1 announcing a ban on ''the use or possession of whistles in the yard by anyone except those authorized to use them[,]'' and a further ban on ''the use of any other type of signaling device or other disruptive practices including work slow downs.''

On the witness stand, Godinez seemed to reject as ludicrous Hinrichsen's fears of such whistleblowing mischief, but Godinez became coy when invited to explain what other purpose he might have had for urging workers, in the final line of his poem, to ''Listen to the whistle as it will appear.'' At one point he tried to dismiss the whole verse as merely a playful exercise on the part of himself and unnamed collaborators, but in later cross-examination Godinez seemed to validate company fears that ''bringing whistles into the yard'' was, indeed, one of the ''forms of resistance'' he envisioned as a legitimate part of the ''inside game.''[37] Moreover, as I further narrate, infra, Zschiesche was still making ambiguous announcements regarding ''whistles, and the unions' intended uses for them, on the morning of the in-plant work stoppage of March 17.

Moreover, NASSCO's fears of mischief could hardly have been assuaged by the Unions' immediate reactions to his published bans: Godinez took the occasion to write back on March 4 in defense of the right of all employees to bear whistles—ostensibly, to protect themselves from criminal attack.[38] He also threatened that the Ironworkers would file unfair labor practice charges unless NASSCO were to ''withdraw this ill-conceived policy'' within ''a one week period.'' And on March 9, the Ironworkers reproduced and distributed copies of this letter to workers at the shipyard, within a flyer captioned, ''KNOW YOUR RIGHTS,'' which also announced a meeting (described as an ''*all union meeting*'') to be conducted that day so that workers could ''Learn from a labor attorney how to obtain a contract with the rights you have.'' Moreover, on March 10, Zschiesche dispatched a letter to

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[37] Godinez was cross-examined by NASSCO's attorney about what ''other forms of resistance'' he may have had in mind when using that phrase in his February 16 flyer. He typically answered with the phrase, ''could be,'' when counsel suggested specific possibilities. Most pertinent to the current discussion is the following exchange between company counsel and Godinez, after several such ''could be'' answers:

> Q. Could bringing whistles into the yard and using them inside the yard—could that be another form of resistance?
>
> A. Yeah.

[38] Thus, in his March 4 letter to Hinrichsen, Godinez wrote that the workers had been ''advised by the San Diego Police Department that one of their best defenses [against thefts and holdups] while going to and from work is a whistle.'' He further claimed that ''a substantial number'' of employees, both male and female, ''carry whistles,'' because of a ''number of incidents of assault, battery and theft from employees outside the NASSCO premises[.]''

Hinrichsen under the Machinists' letterhead, a copy of which was likewise reproduced and distributed at the yard. In this letter, Zschiesche announced that the Machinists would be filing a ''General Grievance'' over the Company's announced bans on whistles, signaling devices, or ''other disruptive practices including slowdowns.'' In this latter regard, Zschiesche declared,

> In addition to our grievance we are putting you on notice that we are aware of the right of our members to engage in *legal, protected, activity at work*, including slow downs, under certain conditions that have been described by the National Labor Relations Board.

Having thus suggested that ''slowdowns'' were among the ''legal'' arrows in the Unions' quiver, Zschiesche then complained that it would be ''*unjust* if NASSCO employees . . . are wrongly fired by the Company for *legally resisting* the Company's offer while on the job.'' And he warned in his closing sentences that, ''Our Union and the others of the Seven Unions are ready to advise our members of their legal rights on the job and protect their jobs from your intimidating tactics. In addition we will make sure that your *unjust* actions do not go unnoticed by the San Diego community and the politicians who make it possible for our shipyard to continue to operate successfully.''

So far as this record shows, any charges the Ironworkers may have filed with the Board concerning Hinrichsen's March 1 bans were never pursued; and the same is true of any ''General Grievance'' the Machinists may have filed. In any case, this prosecution does not challenge Hinrichsen's March 1 bans against whistles or signaling devices or ''other disruptive practices[,] including work slow downs.''

III. JOB ACTIONS IN MARCH AND RELATED EVENTS; 8(a)(1) AND (3) ISSUES SURROUNDING POINTS AND/OR DISCIPLINE IMPOSED ON PARTICIPANTS IN THE MARCH 17 AND 19 ACTIONS

A. *March 8 Sickout*

On Monday, March 8, 936 of NASSCO's 2897 bargaining unit workers employed on that date failed to report for work. By contrast, in the surrounding 9-week period (February 22 through April 19), bargaining unit absences on Mondays ranged from a low of 361 to a high of 445. Thus, even after discounting the total absences on March 8 by the average number of absences on other Mondays, it is clear that NASSCO experienced roughly 500 more absences than usual on March 8.

Rumors of an impending ''sickout'' had begun to reach the industrial relations office late in the previous week: NASSCO's payroll clerk, Carmen Evans, had been getting calls from employees asking if the Company would assess attendance points against workers who participated in the rumored sickout, and Evans had then approached Hinrichsen about these calls. After further inquiry, Hinrichsen found that department supervisors had also been hearing such rumors. Hinrichsen told Evans to tell inquiring employees that participating in a sickout was not an ''excused absence'' under NASSCO's Absence and Tardiness Control Program, and it appears that absent workers on March 8 who had not documented their absence with an acceptable excuse were given two attendance points. However, Hinrichsen also testified that NASSCO chose not to make a bigger issue out of the apparent sickout on March 8, fearing that imposing penalties other than attendance points would merely serve to inflame the situation, and that acknowledging the substantial impact of the sickout might encourage more such actions.

No one has suggested, much less sought to prove, that the dramatic spike in the number of absences on March 8 was brought on by some exotic, 1-day virus sweeping San Diego, or that it was merely coincidental that 500 more employees than usual had decided to take that day off. Thus, even Zschiesche, one of the most cautious and selectively forgetful of the union-agent witnesses, acknowledged that he was at least aware that a ''sickout'' had taken place on March 8. Moreover, the General Counsel concedes on brief that a ''sickout'' occurred on March 8, and he nearly concedes, as well, that the sickout was ''part of a pattern of unprotected intermittent strike activity.'' (Thus at p. 36: ''While it is true that the seven-union coalition did engage in a pattern of unprotected intermittent strikes on April 29, May 17, and June 23 (and perhaps including the March 8 'sickout') . . . . '')

In any case, on this record, it would be useless to pretend that the excess absences were the product of anything other than a union planned ''object lesson for management'' in the form of a sickout. A relatively candid witness, Vitantis Bugvilionis, an Ironworkers shop steward who admittedly participated in the sickout and encouraged his coworkers to do likewise, gave testimony clearly supporting the additional finding I reach—that the excess absences on March 8 were the product of a surreptitious, word-of-mouth call for a Monday sickout begun in the previous week by the Ironworkers, and, perhaps, by other unions, as well. Thus, Bugvilionis admitted, although with some discomfort, that McCammon—and perhaps other union agents—had told him of the planned sickout in the week before it occurred. In addition Bugvilionis admitted that he later discussed the ''effectiveness'' of the sickout with both McCammon and Godinez. Bugvilionis also admittedly warned his coworkers in advance of the sickout that NASSCO would probably assess attendance points against sickout participants. Bugvilionis readily conceded, moreover, that he understood the sickout to be an element of the Unions' ''inside game.''[39]

B. *March 12: NASSCO Announces There Will be no Profit-Sharing Payouts for 1992*

As part of the predecessor union contracts reached by the parties in 1988, NASSCO had agreed for the first time to cover the bargaining unit employees under the Company's annual profit-sharing scheme. Apparently due at least in part to the economic losses it suffered in the 1988 strike, NASSCO made no payouts under the plan for 1988, but it did make payouts for the years 1989, 1990, and 1991. As I further describe below, NASSCO announced on March 12 that there would be no profit-sharing payouts for 1992, be-

[39] Considering the overall context and the usage in preceding questioning, I agree with NASSCO (Br. at p. 26, fn. 30) that the official transcript is in error at p. 400, L. 14, when it attributes to NASSCO's attorney the phrase ''inside group,'' rather than ''inside game.'' Therefore, I grant NASSCO's unopposed motion (ibid) to correct the passage in question by substituting ''game'' for ''group.''

cause it had realized no profit from 1992 operations, in part because of the 3-week strike in October 1992.

This announcement was buried within a three-page letter over the signature of Company President Vortmann, mailed on Friday, March 12 to all employees within and without the bargaining units. Vortmann began the letter by declaring that, unlike his practice in previous years, he would not be holding his annual ''State of the Yard'' speech to the assembled shipyard workers. Instead, as he wrote, ''I am sending this written message to give you an explanation of the companies [sic] progress and the challenges we face[,]'' and ''I will later schedule small meetings with different parts of the yard to answer your individual questions.''

In several following paragraphs Vortmann traced the progress of and problems associated with various 1992 projects. In this regard, he stated that ''[o]ur biggest lack of success in 1992 was our inability to arrive at a satisfactory conclusion to our labor contract[,]'' adding that the ''25 day strike'' in October 1992 had not only worked a ''serious hardship'' on the ''Union workers,'' but that the ''cost'' of the strike to NASSCO was ''in the millions,'' and, therefore, ''when the union employees attempt to 'hurt the Company' as a means of securing their desires in the labor contract, they *directly* hurt themselves.''

Then Vortmann dropped the bad news, as follows:

> The combination of NASSCO having to reverse the profits we booked on Matson [a shipyard customer] in '91 and the economic cost of the strike more than offset the profitable results in Repair. We ended 1992 with a slight pre-tax loss overall. Consequently . . . there unfortunately will be no profit-sharing check because there were no profits generated.

In succeeding lines and paragraphs, Vortmann described the future picture: He warned at one point that ''[t]he bottom line is very simple—there is not enough expected new work to keep all the existing shipyards at their current employment levels[,]'' but added that ''NASSCO can win new work and we can maintain our employment levels, but we can only do that *if* we are the most productive and cost efficient yard.'' Still later, he outlined the Company's ''goals'' for 1993, citing, inter alia, the ''need to finalize a new Union Labor Contract.'' And he concluded with these words:

> We have devoted too much time and attention and we have all lost too much money as a result of our inability to settle on a fair and equitable contract. The Company has been listening to the Union negotiators and to all the comments from employees in the yard. We understand the concerns, believe me! At the same time I ask all the NASSCO employees to think real hard about the realities of the shipbuilding market place. Change and challenge are never easy. But if we are afraid to step up to the challenge, there is no way we can succeed.
>
> I am confident NASSCO can return to its winning ways and to its profit sharing checks. But it is entirely up to *us*! Let's get back together and make it happen in 1993.

This no-profit/no-payout announcement was probably no surprise to the Unions; they had rights, as both Zschiesche and Godinez acknowledged, to review the relevant profit-sharing accounting records under terms and conditions established by a previous agreement, which terms were continued in NASSCO's last offer and in its implementation thereof in late February. And although the Unions had not exercised these rights, they knew that their October 1992 strike (like their previous strike in 1988) had cost the Company ''millions.'' (See, e.g., Godinez' March 16 flyer, infra.) Moreover, while it may be presumed that no employee was happy with Vortmann's announcement, neither does it appear that this announcement triggered any immediate groundswell of protest once the workers received it through the mails, which I presume occurred no later than Monday, March 15. Instead, it appears that it was not until the Unions themselves chose to make Vortmann's announcement the central issue of a rally conducted within the shipyard on Thursday, March 17, that a relatively small number of the bargaining unit employees, coached and shepherded by union agents and stewards, conducted an in-plant work stoppage after lunch for the nominal purpose of ''demonstrating'' their displeasure over the announcement.

C. *Godinez' ''Confidential'' Flyer of March 16*

On March 16, Godinez prepared and signed another flyer printed on Ironworkers' letterhead, this one a two-page writing captioned, ''IT'S UNION TIME.'' When NASSCO's counsel confronted Godinez during cross-examination with a copy of this flyer, Godinez expressed both surprise and outrage that the Company had gotten a copy, protesting that it was an ''internal union document,'' and a ''confidential'' one at that. He also claimed that it was not distributed generally to employees ''at the gate,'' but rather, ''just [to] the shop stewards,'' of which there were ''about 30.'' While I will assume for purposes of analysis that Godinez was truthful in claiming that he ''distributed'' copies of this flyer on a ''confidential'' basis only to the Ironworkers stewards, I discredit him on both demeanor and probability grounds in his later, and quite hesitantly stated claim that he did not begin distributing these flyers to the stewards until ''probably . . . a few days after [March 16].'' Instead, I find, that Godinez, having prepared and signed the flyer on March 16, began to distribute it without further delay—on either March 16 or the morning of March 17. Moreover, I note that the contents of the flyer seem to be addressed to employees generally, and that there is no evidence that Godinez instructed the stewards not to show or pass out copies to other employees. Accordingly, I will assume that the stewards, performing their traditional function as go-betweens, did show or pass out copies to their fellow workers.

The flyer began with these two paragraphs:

> It's human nature to reject uncertainty, and that's why it's important to show some facts! The ''Inside Game'' is nothing new; however, it is a method that doesn't get much publicity. The reason it's not publicized is *not* because it's not effective—but because it works much better under cover.
>
> A good book on the Inside Game is published by the AFL–CIO. There are many other examples of how it works, including our own experience in 1987–88. The

Inside Game works well; coupled with a strike, it works *even better*!

Over the course of several more paragraphs, Godinez recapitulated the history of the contract impasse and eventual strike in the period 1987–1988, pointing out in the process that the Unions had played an ''Inside Game'' for ''six months'' after the expiration of the old union contract, by conducting shipyard rallies and a ''work-to-rule'' campaign. This campaign alone, said Godinez, eventually caused enough economic impact to induce NASSCO to improve its original contract proposals. Godinez further recalled that, after the members eventually rejected the improved proposals and conducted a 3-week strike in September 1988, NASSCO improved its offer even more, leading ultimately to a new agreement which included, inter alia, a ''Profit-Sharing Plan which has paid out in most years.'' And in the final paragraphs of the flyer, Godinez said this:

How Much Loss Did the Company Suffer During Inside Game?

A newspaper article appeared in late 1988 that quoted the Merrill Lynch Financial Institution as stating that Nassco had lost more than 50 million dollars in 1988. It attributed such loss to ***Labor Unrest.***

How Much Has the Company Lost During the* CURRENT *Labor Dispute?

There is a difference in this labor dispute as we went out on strike right away. Nassco has lost millions of dollars very quickly; and with the heavy dissatisfaction of the workers towards the Company, the economic impact continues.

Did the Company Learn How the Inside Game Was Played in 87–88?

Yes, Steve Workman was a Chief Shop Steward during our ''Inside Game'' and now he is a Labor Relations Representative for the Company. the Company knows the old-inside game but this new inside game is structured with a new twist and is protected by the National Labor Relations Act.

What Can We Do To Win a Labor Contract?

Under the National Labor Relations Act we have a right to act as a group against Nassco. The law gives us a right to act as a group and resist overtime work. Work only on what we're told. . . . Nothing more nothing less, work very very safe and take absolutely no chances. Don't hook up or get ready to work until the whistle blows, close the yard down and strike and many other actions gauged to cause an effect on the Company.[40]

Special daily group meetings are being held in almost every area of the yard.[41] Inquire about your nearest location and be a part of winning.

[40] Godinez was again consistently evasive and unilluminating when invited during cross-examination to explain what he had in mind when referring in this flyer to ''many other actions gauged to cause an effect on the Company.''

[41] See fn. 36.

D. *March 17 Events*

I have already summarized the most significant event of March 17—the post-lunchtime demonstration/strike conducted within the shipyard by a group of 40–60 workers and union officials and stewards for about 31 minutes after the final company chime had sounded, signaling the end of the employees' lunch period and the resumption of work. I have already found, in summary, that this supposedly ''spontaneous'' gesture of worker outrage over Vortmann's earlier announcement of no profit-share payouts was, instead, another union-orchestrated ''object lesson to management,'' done to wobble the job, and done as part of a pattern of intermittent job actions calculated in their totality to do enough economic damage to NASSCO to induce it to improve its last offer at the bargaining table. It remains for me to narrate the additional details of fact concerning events on March 17 which plainly add substance to that summary finding.

1. Gate 6 rally in the morning

The morning events at gate 6, including the speeches and sounds associated with them, were recorded with a videotape camera and boom microphone which Security Captain Hutchins was conspicuously operating from the roof of the adjacent building 15. My findings below are based mainly on what I can see and hear on Hutchins' tape, and are aided by undisputed supplemental testimony concerning these events. My findings concerning statements made in the final minutes of the morning rally are also consistent with a company-made transcript (R. Exh. 38(b)) of the audio portion of the tape covering those final minutes, a transcript whose accuracy is not itself in dispute.

Zschiesche and Godinez apparently arrived early at gate 6; they were already there, bullhorns in hand, at about 6:11, when Hutchins switched on his recording gear. They soon became closeted in a conversation (not audible on the tape) that lasted almost 4 minutes. Some minutes later, as the trickle of arriving workers grew to a steady flow, McCammon appeared in view, as did officials or stewards from at least three other Unions, the Machinists, the Electrical Workers, and the Carpenters.[42] Most of these agents joined Godinez, McCammon, and Zschiesche in passing out what appear to be one-page leaflets to arriving workers.[43] At

[42] Ironworkers Steward Bugvilionis was admittedly present. Others, identified only from the videotape, were Berger (Bill) Enbom, chief shop steward for the Carpenters; Scott (Sparky) Russell, an Electrical Workers steward, and Daniel Eck, a Machinists steward. (Although Eck testified that he did not recall attending the morning rally, he has a distinctive hairstyle and he is easily recognizable on the videotape of the morning rally as one of the union stewards passing out handbills, as the General Counsel concedes (Br. at p. 11).)

[43] Because it appears that only single-page leaflets were being distributed, these could not have been the two-page leaflets, supra, prepared by Godinez on March 16 for supposedly ''confidential'' distribution to Ironworkers stewards. The General Counsel presumes (Br. at p. 11), and I do, too, that the leaflet being passed out was the one received in evidence as R. Exh. 9, an unsigned, one-page flyer on the Machinists' letterhead, dated March 17, and captioned, ''VORTMANN DUCKS YARD ADDRESS & SENDS AN ANTI-UNION MESSAGE.'' In that flyer, the unknown author states, inter alia, that,

various points, Godinez urged arriving employees by bullhorn to ''stick around'' so that everyone could ''go-in together,'' at ''Union Time.'' As more minutes passed, and a larger group of workers began to form around or near the union agents, McCammon used a bullhorn to deliver various messages ridiculing Vortmann and his recent announcement that there would be no profit-share payouts. He also reminded the workers of the Unions' plans for a ''social visit'' on ''Saturday'' to be paid to the home of an unnamed ''favorite company official.'' (See last footnote. I also note that on Saturday, March 20, a union demonstration was conducted at Vortmann's home, followed by another such visit on another nearby Saturday.) At other points, Zschiesche used his own bullhorn to make similar speeches. Finally, with only a few minutes to go before the scheduled ''Union Time'' march into the yard, we reach the point covered by the transcript of the audiotape.

Zschiesche is the first of the speakers whose statements were thus transcribed. In edited form, this is what he said:

> We're going to have this so-called meeting in the sandpit. We'd really like Mr. Vortmann to be there . . . but if he is not there maybe we'll have a state of the yard address among ourselves and lets hear it from each other once in awhile, and that's what our brothers and sisters stand up and want some real stuff, and not have to listen to garbage which is usually long talked about. So I am telling you, be there in the sandbox today at lunch time. Let's hear from you, let's hear from us, we'll have our own state of the yard address.

Then McCammon spoke, in edited part as follows:

> When Dick Vortmann pops the video cassette in the player today to review what's going on, there is a message for him,[44] ''Dick, you're wanted in the yard, you need to stand up before thirty-seven hundred people and tell us what became of the money . . . we're waiting . . . you think you can get away by just sending letters to our house. I don't think so . . . we don't play that.'' Okay, it's two minutes, two minutes to union time, stand by and we'll all walk in together. Two minutes.

Then Zschiesche spoke again, now addressing the matter of the recent dispute over ''whistles,'' in edited part as follows:

> Anybody who has a whistle last time from the march, bring your whistle. If you didn't have a whistle or need a whistle, we got some from last time we'll be handing out this Saturday . . . . We're American citizens, you're out in the streets here, you can blow a whistle, but the Company wants to say that when you walk inside that gate, you have no right of an American citizen anymore . . . . We're not out to create accidents. . . . We're not that stupid. . . . [T]he Company thinks we're stupid, they want to keep us stupid, they want to deny you rights to blow a damn whistle in the yard. So we're going to tell people to bring them whistles on Saturday because wherever we go they're going to hear from us, we're going to say, ''Goddamit, we're American citizens, we're going to blow whistles whenever we want!'' This is America and American workers have the right to express themselves under the Constitution of the United States. You can't tear up the Constitution when you walk in gate 6.

Then, after Zschiesche had thus delivered yet another ambiguous message (to the workers and to company management believed to be monitoring his speech) on the matter of whistles and where and when the Unions intended to encourage their use, McCammon took up his own bullhorn, announcing as follows:

> Okay, so you know what's up, right?
> [Voices respond, ''Sandpit-Sandpit at lunch time.''] Get your timecard, punch your timecard out!

On McCammon's final words, the assembled workers walked together through gate 6.

2. The significance of ''punch[ing] your timecard out''

McCammon's parting direction to ''punch your timecard out,'' although understandably mysterious to an outsider, had a special resonance in shipyard rule and practice, which requires a digressive set of elaborations.[45]

Hourly employees who intend to remain in the shipyard during the 30 minutes' unpaid time NASSCO allots for lunch do not punch out their timecards when they begin their lunch period; instead, they leave their timecards in the rack in their department, under the custody and control of their supervisor. And if they return on time after lunch, neither do they punch back in; NASSCO's payroll clerks will simply reduce the number of hours and minutes shown on the daily timecard by 30 minutes. On the other hand, when workers intend to leave the shipyard at lunchtime, they will retrieve their timecard from their supervisor, then punch out the card at the start of the lunch break, and then surrender it to the gate guard on exiting. Beyond merely limiting the potential for ''stealing-time'' abuses, these procedures are designed to ensure that the Company will know by checking the timecard racks and any collection of timecards in the guardhouse which employees are or are not somewhere in the sprawling shipyard complex at any given time. And this knowledge may be a critical aid in determining whether a ''missing''

We think Dick should have the guts to stand in front of 3,700 shipyard employees and look us straight in the eye while he reads his letter and then hears our response. Duck, Dick, Duck!

But that is not going to happen so *we will hold our own shipyard addresses among ourselves at lunchtime*. Also, come to a *special shipyard address at the home of one of our favorite top management officials this Saturday morning, March 20*.

[44] This is not the only indication that union agents and workers were fully aware that their activities at gate 6 on March 17 were being monitored by videocamera and microphone, and were using that system to communicate ''messages'' back to company management. Thus, in earlier, untranscribed portions of the tape, both Zschiesche and McCammon can be seen and heard clearly directing gestures and statements either to ''Hutch,'' who was operating the camera, or to ''Dick Vortmann,'' presumed to be a regular viewer of the tapes. Indeed, in one such instance, McCammon speculated sarcastically that Vortmann must be a ''masochist'' for subjecting himself to such presumed daily studies.

[45] I draw these elaborations mostly from descriptions, admissions, or acknowledgments variously made by the following witnesses: Godinez, Bugvilionis, Lopez, Eck, Long, Tyvoll, Simpson, Root, and Whitley.

worker is missing due merely to departure, or perhaps due to a mishap or catastrophe in the yard.

These practices have additional significance under the Company's Absence and Tardiness Control Program.[46] Although some details and nuances of this program remain obscure, there is wide agreement among the witnesses about certain features of its application that are relevant to this case: Everyone agrees, for example, that when a supervisor delivers a timecard to a worker intending to leave the shipyard for lunch, this gesture will insulate the departing worker from disciplinary ''penalties'' for either of two distinct offenses under NASSCO's published ''Standard Rules of Conduct.'' These are, ''Leaving one's work area during working hours without permission'' (''Group 3, Rule 11''), or ''Leaving the plant during work hours without permission'' (''Group 2, Rule 6'').

Nevertheless, as Bugvilionis, among others, clearly acknowledged, when a supervisor gives a timecard at lunch to a worker intending to leave the shipyard, this gesture will not insulate the worker from being assessed one or more ''attendance points'' under the ''no-fault'' aspect of the Company's program, if the worker returns tardily, or not at all. (The notion of ''no-fault'' here is apparently linked to the fact, acknowledged by all parties, that a worker is ''free'' to accumulate up to 12 attendance points for tardiness or absence within a 90-day period without facing any disciplinary penalty, except a ''warning'' when the worker reaches his 12th point within the counting period.) Rather, such points will normally be assessed whether or not the worker's tardiness or absence was preceded by the supervisor's having delivered the timecard to the worker before he or she left. By further contrast, however, no points will be assessed for a worker's ''excused absence'' *within* the shift—usually only for a medical appointment or other matter of compelling personal necessity, normally arranged between worker and supervisor at least several days in advance. And in such circumstances, the supervisor will not merely deliver the timecard to the departing worker, but will ''sign'' it (and perhaps make an explanatory entry, as well) to indicate that the departure was not simply known in advance to the supervisor, but ''excused,'' and thus exempt from an attendance point assessment or any form of discipline for absence or tardy return.

Shop Steward Bugvilionis, operating under this same general understanding of the pertinent rules and practices, admittedly told other workers during the morning of March 17 that if they planned to go to the sandpit rally at lunch, it would be ''advisable'' for them to take their timecards with them. And Bugvilionis admittedly retrieved his own timecard from his supervisor before attending the rally, admittedly because he knew or believed he would not be returning to work immediately after lunch, and perhaps not for the rest of the day. Although Bugvilionis vaguely suggested at one point that he might have had purely personal plans to leave the shipyard that afternoon, I think this was untrue; for Bugvilionis also admittedly knew or believed—although he claimed not to recall the source of his knowledge or belief—that ''something'' was probably going to ''happen'' after lunch that would prevent him from returning on time.[47] Similarly, Machinists Steward Eck eventually recalled that at some point at work that morning, ''somebody'' (Eck claimed not to recall who this was) told Eck to ''be sure to bring your timecard'' to the sandpit rally. (Later, Eck implied that he got this instruction from more than one person.)[48] And Eck admittedly followed this instruction by retrieving his timecard and punching it out before going to the rally, conceding further that ''the practice at NASSCO is you don't have to punch your timecard out for lunch unless you are going to leave the yard.'' However, like Bugvilionis, Eck claimed not to know specifically what the ''bring-your-timecard'' instruction portended, only that ''something might be up.''

With all of the foregoing in mind, I find in conclusion as follows: McCammon's ''timecard'' instruction to workers at 6:40 a.m. would reasonably be taken both by the workers and the company agents who heard it—and was so understood by both audiences—as an announcement that the Unions intended as of 6:40 a.m. to call on their members either to leave the shipyard after the lunchtime rally, or to refrain from returning to work immediately after lunchtime. Moreover, Bugvilionis' and Eck's admissions clearly imply (and further findings below merely reinforce this) that they, like other stewards and rank-and-file workers who punched out their timecards before heading off to the lunch rally, were essentially passive actors in the unfolding drama, at all times waiting for cues and directions from top union officials as to the precise roles they were expected to perform at any given moment that day.

3. Sandpit rally at lunch

The sandpit (or ''sandbox'') is a spacious area within the shipyard where large structural members are staged and stabilized in sand until they are hoisted for assembly on the shipbuilding ways. Located near a covered lunch ''shack,'' the sandpit forms a kind of natural outdoor amphitheater, and on the many sunny days that San Diego enjoys, it was com-

[46] The briefing parties agree that NASSCO has a ''program'' that goes by this name, and they roughly agree on the way it works. The record also contains indications that the program is described in a written publication. However, no copy of any such publication was ever tendered for receipt into evidence.

[47] The following exchange during Bugvilionis' cross-examination by NASSCO's counsel is revealing, particularly in Bugvilionis' use of certain plural pronouns emphasized below:

> Q. Now, if you don't have to pull your time card unless you're leaving the plant and not coming back to work, or you are leaving the plant and coming back to work, why did you pull your time card on March 17th?
>
> A. Why did I? Because if you're not punched out after lunch, they can discipline you, but if you are on your own time, it's like just coming back late from lunch.
>
> Q. Isn't it true that, when you took your time card from your foreman on March 17th, you knew you were not going to be back to work on time at 11:45?
>
> A. Yes, I was making that assumption that we weren't—
>
> Q. That's right, but what were the facts that led you to that assumption? You knew something would happen after lunch as a result of the sandpit rally, isn't that true?
>
> A. Yes, it could have, and I'm saying it could have. *They* were saying maybe, maybe not.
>
> Q. The likelihood was so great, however, that you pulled your time card because you knew you weren't going to be back at 11:45.
>
> A. Yes.

[48] Thus, Eck later volunteered, ''*They* just said, 'get your timecards' so I did.''

mon for NASSCO's employees to congregate there during their lunch period. Also, during the 1987–1988 contract hiatus preceding the 1988 strike, the Unions had occasionally held rallies in the sandpit at lunch time for the general purpose of maintaining and reinforcing a spirit of union solidarity among the workers.

The lunch period for hourly workers begins at 11:15 a.m. and ends at 11:45. NASSCO uses an amplified series of ''chimes'' to signal the end of the lunch period, apparently similar to the system used in performance halls to alert patrons that an intermission is drawing to a close. At the shipyard, the first chime sounds at 11:44, and the second at 11:45, by which time hourly employees are expected to be back at their work stations, and are vulnerable to attendance points or possible further discipline if they are not.

The witnesses' testimonial accounts of the sandpit rally are largely impressionistic, and they vary one from the other in emphasis and detail. Most agree, however, and I find, that the rally included the following main features: Anywhere from 100 to 300 employees gathered around the sandpit shortly after the lunchbreak began. Although some company agents stood or passed nearby, no one taped or photographed these events. Godinez, McCammon, and Zschiesche took turns addressing the group during most of the rally, variously deploring Vortmann's announcements that there would be no profit-share payouts, and that he would not be holding a State of the Yard address, but would instead be conducting small group meetings throughout the yard. In the last 5 minutes of the lunch period, most of the workers attending the rally began to drift away and head back to their jobs. However, after the first chime sounded, a smaller group of remaining rallyers, which included Zschiesche and Godinez, huddled together in the center of the sandpit for a ''prayer session.'' Godinez vaguely recalled in this regard that he offered a prayer for ''assistance . . . from someone up above,'' and that Zschiesche ''joined-in.'' Carpenters Steward Long recalled, by contrast, that someone offered some words in memory of a recently deceased Ironworkers member. Apart from these hazy fragments, the participants who testified claimed not to be able to recall what Godinez or Zschiesche might have prayed for, or what other words they might have uttered while the smaller group was thus huddled.

4. After lunch demonstration at Ball's office

The prayerful huddle broke up almost exactly at the sounding of the second chime at 11:45. Zschiesche then addressed the remaining rallyers. Zschiesche recalled (and Godinez agreed) that he asked the now shrunken group if they wanted ''answers'' to their ''questions'' about the profit sharing, and that ''someone'' said in reply, ''Let's go to John Ball's office.'' Although Zschiesche and Godinez claimed not to recall who this ''someone'' was, I find, based on the seemingly more candid testimony on this point furnished by Machinists Steward Eck, that the ''someone'' was Zschiesche himself.[49] Although the second chime had sounded by this point, 50–60 rallyers, including Zschiesche, Godinez, McCammon, and at least 11 other union officers or stewards,[50] began to march towards a two-story structure some 50 yards away that housed on its second level the office of General Production Foreman John Ball.

Based on the harmonious features in the accounts of most of the witnesses, I find as follows concerning events within the first 11 minutes (11:45–11:56) after the breakaway group marched on Ball's office: The demonstrators, chanting, ''Where is the profit-sharing!'' and ''We want our money!'' gathered at ground level in front of Ball's office structure. At Zschiesche's suggestion, a smaller delegation or ''committee'' composed of about five workers (selected to represent each of the shipyard craft Unions who had members in attendance) walked up the outside stairs to Ball's office, where they were headed off by Ball on the second-level balcony in front of his office. The delegation asked Ball for ''answers'' about what had happened to the profit sharing. Ball said he had no idea, and suggested they call Vortmann. Ball also told them, however, that he had placed a call to ''Industrial Relations,''[51] and warned them that their ''lunchtime was over,'' that their gathering was ''illegal,'' that they were vulnerable to ''points'' or other discipline, and that they should ''get back to work.'' The delegation returned to join the group waiting on the ground level. Zschiesche soon went to a nearby telephone and called Vortmann's office, but was told Vortmann was not in, whereupon Zschiesche returned to the group. Soon after this, a supervisor named Flores (described by Bugvilionis as a ''very brave soul'') waded into the group at ground level and called out a ''direct order to get back to work.'' He was greeted by shouts of derision, and (as Godinez most specifically recalled) many workers held up their punched out timecards, apparently to demonstrate that they were not ''on the clock'' at the moment. At this point either Ball or Flores' own supervisor advised Flores to withdraw from the group, and he did.

At about 11:56, Security Captain Hutchins arrived at the scene, switched on his portable video/audio gear and began to record the activities in front of Ball's office, continuing through the point at 12:16 when the demonstration ended. (Also, at roughly the same time, Ball hoisted a Polaroid still-photo camera and took a series of snapshots of the assembled demonstrators arrayed below him.) The din of resumed work in the shipyard tends to dominate Hutchins' audio recording for several minutes thereafter, and to obscure most of the

[49] Thus, concerning the moment in question, Eck recalled, ''So it was decided, I believe it was Peter Zschiesche, said, et's go find out,''' whereupon the remaining group ''went across to John Ball's office[.]''

[50] Listed next, in addition to Zschiesche, Godinez, and McCammon are persons holding union positions who were either admitted participants in the postlunch demonstration, or were credibly identified as participants (by McCammon and/or by Hinrichsen) from photographs and videotapes of the event: ***Ironworkers*** **: Shop Stewards Bugvilionis, Johnston, Wanamaker, Anderson, Gorham, and Parga;** ***Electrical Workers*****: Shop Steward Russell;** ***Machinists*****: Chief Steward Foster and Shop Steward Eck;** ***Carpenters*****: Chief Steward Enbom and Shop Steward Long.[*]**

[*] I rely on Long's testimony that he was a Carpenters' steward. I note that NASSCO's brief (vol. I, p. 41) identifies Long as an ''Ironworkers'' steward; however in the passage of Hinrichsen's testimony cited by company counsel, Hinrichsen nowhere identifies Long as an Ironworkers' steward.

[51] Hinrichsen was not available to receive this call; he was then golfing with an international representative of the Ironworkers, named Shelton. Instead, another industrial relations staffer, Workman, came to the scene, as did Security Captain Hutchins, carrying his videocamera.

statements made by Zschiesche, who was addressing the group, and the occasional statements from those within the group, as well. Starting at about 11:59, however, larger fragments of these statements become audible, and whole sentences become audible at and after 12:13. From looking at and listening to the tape, and aided by identifications of participants made mostly by McCammon or Hinrichsen, I find as follows concerning events from 11:56 to 12:16.[52]

First, some overall findings: Throughout most of this 20-minute period the demonstrators were arranged in a nearly enclosed circle around Zschiesche, leaving about 5–10 feet between Zschiesche and the rest. McCammon and most of the other union agents or stewards were in the front ranks of the semicircular array; Godinez, however, was positioned off to one side of Zschiesche during most of this period, within the more-or-less unoccupied space enclosed by the arc of the semicircle of onlookers. Throughout this period, Zschiesche did most of the talking and clearly functioned as the master of ceremonies, although other voices were heard at intervals responding to Zschiesche's statements.

Next some particulars: Between 11:57 and 11:58 a.m., Zschiesche gestured towards Hutchinson and his camera and noted aloud that the demonstration was being recorded, whereupon several demonstrators waved up to Hutchins, now perched on the balcony in front of Ball's office. In this same connection, Zschiesche announced that anyone who received ''points'' or ''warnings'' for their participation should ''talk to their union about it.'' Then Zschiesche launched into a new speech about the profit-sharing issue. At 11:59, as Zschiesche concluded these remarks, Godinez began to chant anew, ''Where is the profit-sharing!'' and waved his arms to invite the rest of the demonstrators to join in, which several briefly did, while most others merely stood mute, many with looks of bemusement on their faces. Nearly 2 minutes then passed while everyone stood idly. At 12:01 p.m., however, both Godinez and Zschiesche noticed industrial relations staffer Steve Workman in the area, and they together shouted and waved to him to come over to ''talk to the committee about profit-sharing.'' Workman did not accept the invitation. At 12:02, Zschiesche again gestured towards Hutchins, perched on the balcony, then shouted to the group, ''How many people are afraid of these cameras?'' simultaneously raising his arm to suggest how anybody who might be ''afraid'' could so indicate. Several participants laughed; none raised an arm.

At 12:03 p.m., following another brief lull, Zschiesche began another speech. In substance, he likened the solidarity shown by the assembled demonstrators to that shown in the early 1980s by the ''Polish shipyard workers,'' who, Zschiesche noted, had not only succeeded in ''shut[ting] down a shipyard,'' but in ''shut[ting] down the whole goddam government.'' Then, gesturing again towards Hutchins, he likened NASSCO's taping of the demonstration to the crackdown on the Polish Solidarity Movement imposed by the ''communist'' martial law regime. Concluding these perorations, Zschiesche shouted, ''We're waiting for answers to our questions!''

This was followed by a another lull that lasted nearly 8 minutes, during most of which time most of the demonstrators simply shifted from foot-to-foot and made small talk with their neighbors, while some others milled about, occasionally pausing to exchange low fives with friends or confederates. During this same extended intermission, i.e., from about 12:05 until 12:13 p.m., Godinez and Zschiesche at least once put their heads together for brief discussions, and McCammon emerged from the semicircle of onlookers and had similarly brief exchanges with both Zschiesche and Godinez. Also, at one point Godinez, McCammon, and others waved up to Hutchins, and McCammon called out, ''Can we get a copy of that, Hutch?''

At 12:13 p.m., Zschiesche broke the extended lull, shouting to the milling demonstrators,

> Okay, everyone get around me, come over here. [Inaudible phrase.] This is not a strike, we're not on strike today, we can stay here [inaudible seconds]. . . . You've got a right to be here. Number one, you can stay here all day, go to work, or you can leave and come back to work tomorrow or the next day. You've got a choice.
>
> [Unidentified voices shout, ''Go home!'']

Immediately thereafter, and continuing through the final minutes of the rally, the following speakers can be heard saying the following things in the following order:

> ZSCHIESCHE: Let me tell you this, if anybody here is punched out, they can go home, that's your choice. If we go home, we all go home together. If you want to stay in the yard, we can do that too.
>
> [Brief, inaudible shouts from the group.]
>
> CARPENTERS CHIEF STEWARD ENBOM (after brief remarks into Zschiesche's ear): I know for a fact that Vortmann is going to be in the building behind us on Friday, 1:45, that is, the Engineering Department. Let's invite him, 11:15, to the sandbox on Friday.
>
> [Unidentified voice]: We're going to march [inaudible] . . . .
>
> ZSCHIESCHE: Right now we're having a meeting—if we go [presumably meaning, ''go home''], it's protected. . . . Marching around the yard, I can't tell you that. [Inaudible phrase.] I'd like to save that for another day, another time because we got to get our shit together, get more people here. I don't want to lose you guys. You guys are the good guys.
>
> Alright, there is a motion here to adjourn,[53] take this up tomorrow or the next day or any day we want to.

[52] Again, my findings below about statements made at and after 12:13 are consistent with an undisputed, company made transcript (R. Exh. 39(b)) of the recording of the most audible statements made in that period.

[53] I cannot detect on the video/audio tape any indication that anyone did, in fact, make such a ''motion to adjourn.'' I find that Zschiesche simply declared that there had been such a motion even though none had been made. I infer that he did so in part to maintain the fiction before company onlookers that he was merely ''presiding'' over a ''meeting'' of the membership, and was merely following parliamentary procedure to determine the democratically expressed will of the rank and file. However, given the dynamics of the immediate situation, I infer that the main reasons he announced (falsely) that there was a ''motion to adjourn'' were to reassert directorial control over the cast of players, and to reemphasize his previously expressed preference that they ''save'' any further job actions for ''another day,'' when the unions would be able to ''get their shit together'' by ensuring a larger worker turnout.

[Unidentified voices speaking over one another]: Tomorrow-Friday-right now-Friday.

ZSCHIESCHE: All in favor say ''Aye.''

[Unidentified voices in unison]: AYE!

ZSCHIESCHE: All opposed?

[Silence.]

ZSCHIESCHE: I thank everyone of you for being here, thank God for the union, thank God for the seven unions, thank God for everybody in the yard.

It was now 12:16 p.m., and the group began to disperse, some among them shouting, ''Friday!, Friday!'' Moments later, McCammon cupped one hand to the side of his mouth and called out to the departers, ''Don't forget to punch back in.''

E. *The Lawfulness of NASSCO's Issuance of Attendance Points and/or Other Discipline Against March 17 Demonstrators*

Hinrichsen decided, after getting clearance from NASSCO's CFO, Hallett, to assess one attendance point for tardy return against all workers who could be identified as having participated in the after-lunch demonstration. In most cases, apparently, this identification task was made simpler by the fact that most such workers had followed instructions preceding the sandpit rally to punch out their timecards before leaving for the rally, and then punched back in on their tardy return between 12:16 and 12:20 p.m. Moreover, it was apparently *because* those workers had retrieved their timecards from their supervisors and had punched out before leaving for lunch that Hinrichsen decided that persons in that class could not be issued *more* than the attendance point normally assessed against workers who left the yard with a supervisor's *permission*, but then made an *unexcused* tardy return, as I have previously described the system.

There is no dispute that a tardy return after punching out before lunch would, in normal circumstances, trigger at least a one-point assessment against the tardy returnee. Thus, the only legal question presented by these facts is whether the after-lunch demonstration was an activity protected by Section 7. If it were, then it would be no defense for NASSCO to argue that the activity violated a company rule, because employers aren't allowed under our statutory scheme either to make rules which purport to bar protected strikes or work stoppages, or to interpret or apply ''attendance'' rules in such a way as to have the same effect.[54] By parity of reasoning, however, if the stoppage were not protected, then NASSCO's assessment of the normal attendance point for returning tardily from lunch after punching out would not implicate any rights under Section 7.

The General Counsel argues, correctly, that the demonstration in front of Ball's office is easily classifiable as either a ''strike'' or a concerted withholding of work tantamount to a strike. (For reasons noted earlier, I dismiss as barracks-lawyering Zschiesche's attempts while leading the demonstration in front of Ball's office to characterize the gathering as some kind of union ''meeting,'' attended by parliamentary formalities—and, therefore, ''not a strike.'' In any case, characterizing the demonstration as a ''union meeting'' would not alter my conclusion that it was an unprotected one. See *Gulf Coast Oil Co*., supra, 97 NLRB at 1513.) The General Counsel concedes that this strike was followed in succeeding months by a series of three, unprotected ''intermittent'' strikes, and was preceded by ''perhaps'' another unprotected one—the March 8 sickout. The General Counsel insists, however, that the 31-minute, in-plant strike on March 17 was protected by Section 7, because it was not part of the ''pattern'' of intermittent striking, but rather, was a ''spontaneous'' strike, born out of rank-and-file worker outrage over NASCCO's no-profit/no-payout announcement.

After considering the immediate background to and the details of the March 17 stoppage, I cannot agree with the General Counsel. Rather, I find that the in-plant strike was a union-staged performance. And as such, it was no more ''spontaneous'' than is any other kind of theatrical production, which, no matter how amateurish or loosely rehearsed, is by definition an affair which is produced, managed, and directed by *someone*, and an affair, moreover, which does not easily tolerate genuine spontaneity of behavior by its ''extras,'' or its ''bit-part'' players. Indeed, I find that the after-lunch strike was the second in a series of at least six such productions staged by the Unions at intermittent intervals so as to impose an economic burden on NASSCO while at the same time avoiding the risks to workers of a forthright and continuous economic strike. In short, it was activity beyond Section 7's protections, and I judge, therefore, that NASSCO committed no violation of the Act by assessing attendance points against participants in the March 17 job action.

It remains for me to dispose of the General Counsel's separate claims that NASSCO also violated Section 8(a)(1) and/or (3) by certain other discipline it meted out to two of the March 17 demonstrators, Lopez and Long. In this regard, paragraph 14(d) of the ultimate complaint alleges as follows:

> As a proximate result of the 'attendance points' awarded to Long and Lopez . . . Long was suspended without pay on March 30 and 31 and April 1, 1993, and Lopez was discharged on June 16, 1993 until his reinstatement on September 7, 1993.

As I explain below, the factual allegations as to Lopez' eventual dismissal on June 16 are roughly accurate; that is, without necessarily embracing the adjective *proximate*, I can find at least that there is a chain of causation linking Lopez' eventual dismissal with his having received an attendance point for tardy return on March 17. However, the same cannot be said about the 3-day disciplinary suspension imposed on Long, which traced from unique circumstances having essentially nothing to do with any attendance point he may have incidentally received for his tardy return on March 17.

In any case, without regard to the technical accuracy of the complaint's factual claims or characterizations, I observe first that inasmuch as NASSCO's complained of treatment of Lopez and Long was commonly grounded in their participation in an unprotected work stoppage on March 17, they enjoyed no statutory immunity from discipline for such unprotected actions. (Indeed, in *Embossing Printers*, supra, the Board adopted the judge's reasoning that, ''[s]ince the employee's activity was unprotected, discipline of them could be on any level chosen by the Company.'' 268 NLRB at 723.) At best, they only enjoyed insulation from discipline

[54] See, e.g., *NLRB v. Washington Aluminum*, supra, 370 U.S. at 17.

that was in some sense ''disproportionate'' to their misconduct, and then only to the extent that the General Counsel could establish that a ''motivating factor'' for any apparent harshness in their treatment by NASSCO was their participation in protected activities—and even then NASSCO could escape liability if it could demonstrate they would have received the same treatment without regard to any protected conduct they may have engaged in.[55] And with the latter point foremost in mind, I judge ultimately that when NASSCO took actions against Long and Lopez that were in each case consistent with published company rules and disciplinary practices associated with misconduct by employees identical or closely analogous to the unprotected activities engaged in by Lopez and Long, NASSCO's actions against them were legally privileged.

1. Lopez' eventual dismissal on June 16

Ironworker John Lopez was one of the after-lunch strikers on March 17 who had punched out before leaving for the lunch rally, and NASSCO assessed an attendance point against him for his tardy return. On March 26, Lopez received a ''Second [written] Warning'' for excessive absence or tardiness; and on June 16, he was fired for a new accumulation of points related to absence or tardiness. Although the details of these developments are confusing, and the parties, using common evidentiary sources, have interpreted the evidence somewhat differently, I find as follows, based largely on the documentary record.[56]

At the time of Lopez' March 17 tardy return, he had already received a ''first warning,'' on October 30, 1992, for excessive absence or tardiness in a previous 90-day counting period. He had also accumulated 9 new points for absence or tardiness since the start of the new 90-day counting period, which began on December 25, 1992. Thus, his point for tardy return on March 17 left him with 10 points within the same 90-day period. He then accumulated 2 more points for an unexcused absence on March 24, leaving him with 12 within the same 90-day period. And, as a result of this accumulation of 12 points, he got a ''Second Warning'' under the Company's rules on March 26, included in which was this admonition:

> This is the last written notice that you will receive. Further violation of attendance rules will result in your dismissal from employment.

It is apparent that the attendance point issued to Lopez for his March 17 tardy return was one of the points NASSCO had to take in account to justify under its rules its issuance of the second warning of March 26. It is equally clear that without this March 17 point, he would have gotten no written warning—at least not on March 26. But this second warning had its own implications; it meant that if Lopez were to accumulate more than 12 points in the next 90-day counting period, he could be fired. And indeed, all this came to pass. Within the next 7 weeks after getting his second warning, Lopez accumulated 13 *new* attendance points, and as a consequence of this new accumulation, linked to his previous second warning, he was fired on June 16. Thus, with these facts in mind, I could find, roughly consistent with the complaint, that the ''March 17'' point issued to Godinez at least ''tainted'' not only his second warning, but his eventual discharge on June 16.

The complaint does not call into question the lawfulness of any of the other points NASSCO assessed against Lopez in the periods described above, and the General Counsel disclaimed any such challenge during the trial. The General Counsel also acknowledged during colloquy at trial that, under the prosecution theory of violation, the legality of Lopez' dismissal depends, in turn, on the legality of NASSCO's assessment of the March 17 attendance point, which depends, in turn, on whether or not the March 17 stoppage was protected. I have found that the stoppage was not protected; I have further found that when an employee who has punched out returns tardily from lunch the normal penalty is the assessment of at least one attendance point. Thus, I conclude that NASSCO lawfully assessed the March 17 point, and in turn the March 26 second warning to Lopez, and, in turn, lawfully dismissed him on June 16.

2. Long's extra discipline

Carpenters Shop Steward John Long, another participant in the post-lunchtime demonstration on March 17, admittedly had neglected to retrieve and punch out his timecard before leaving for the lunchtime rally. He testified, however, that he told his supervisor, Rodd Whitley, on his return to his job at about 12:20 p.m., that he had been ''involved in a union activity,'' and was now ''coming back to work.'' He also testified that Whitley replied, ''Okay,'' but concedes that Whitley soon came back to him and told him he would probably get a ''warning'' for his tardy return.[57]

[55] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), affirming *Wright Line*'s analytical approach to cases where the violation ''turns on employer motive.''

[56] See especially G.C. Exhs. 17 and 18.

[57] Whitley denied that he in any sense ''Okayed'' Long's tardy return, or that Long offered any ''union-activity'' explanation for his tardy return. But Whitley admittedly had seen Long during the demonstration in front of Ball's office, and would thereby know quite well the kind of ''union activity'' Long was referring to, if, indeed, Long did make such a reference. In any case, I regard the noted testimonial conflict as irrelevant to any legal issue presented by Long's treatment at NASSCO's hands. Relatedly, I reject as unsupported by reliable evidence any claim that supervisors, as of February-March 1993, were generally ''excusing'' the absences from their work areas during scheduled work time of stewards (like Long) so long as the steward reported that he or she had been away on ''union business.'' On this record, any such claim would have to rely on Long's description of a single—and quite equivocal— incident that occurred some weeks before March 17: As described by Long, on that earlier occasion Foreman Whitley had ''okayed'' Long's 30-minute absence from his regular work area after Long had reported that he had been dealing with a ''safety'' problem by replacing a defective scaffold plank that had been called to his attention by another worker. Long's description is of equivocal significance in the first instance because it fails to show that Long was performing some uniquely ''union'' function in his capacity as a *steward* when he responded to the worker's complaint and then replaced the plank. Rather, his description would just as readily support the counterinterpretation that, in responding to the worker's complaint and replacing the plank, Long was merely functioning in his regular employment capacity as a ''waysman,'' whose job it was to build and maintain safe scaffolds. Much less does Long's description of this incident contain any reliable basis for supposing that Whitley, in condoning Long's absence, was doing so *because* he interpreted Long's explanation for his absence as a ''union-business'' excuse.

On March 19, Whitley filled out Long's evaluation form for the week and gave it to Long. On that evaluation, Whitley had given Long a ''1,'' instead of a ''2,'' for ''Attendance and Timeliness'' during the week. (A ''2'' in this category denotes satisfactory performance and a ''1'' denotes something short of satisfactory.) Whitley also noted in a space for ''Comments'' at the bottom of the form that Long was ''out of his work area without permission on 3–17–93 from 11:45 a.m. to 12:20 p.m.''

On March 24, Whitley further issued to Long a combined written warning and notice of 3-day disciplinary suspension, which Long later served out. This notice cited Long for his ''2d'' violation of ''Rule, Group 3, Number 11.'' (Like violations of other ''Group 3'' rules, a ''First Offense'' under Rule 11 will result in a ''written warning; a ''Second Offense'' [''within one (1) year''] carries a penalty of ''written warning and suspension for three (3) work days,'' and a ''Third Offense'' carries the penalty of ''Discharge.'' Long admittedly had received a warning notice on September 22, 1992, for an earlier violation of the same rule.)[58] As set forth in NASSCO's ''Standard Rules of Conduct,'' the cited rule bans,

> Leaving one's work area during working hours without permission or failing to adhere to the starting and quitting time for one's shift, lunch, and other non-work periods during working hours.

The notice also contained a typed entry in the space provided for a ''General Statement of Violation'':

> On Wednesday, March 17, 1993, you failed to return to your job assignment on time at the conclusion of your lunch [illegible word, apparently overstruck] without prior authorization of your supervisor and [illegible word] without punching your time card [illegible word].

The General Counsel has not clearly spelled out his theory of violation regarding Long's treatment, but he emphasizes in his brief (p. 16) the seeming *oddness* of Long's discipline; thus:

> Whitley's testimony and NASSCO's own paperwork establish that Long did not do anything that any of the [other] employees involved [in the March 17 stoppage] did (and who received only one attendance point).

But this observation, standing alone, is inconclusive in its import, and the General Counsel does not elsewhere suggest what its significance might be. He does not suggest, for example—and neither does the record—that this supposedly disparate treatment of Long was grounded in some special hostility towards him by company management for his having been a union steward or stalwart, or for his having participated in some other, statutorily protected activity.

By contrast, and contrary to any such suggestion, I find unmistakable indications in this record that any supposed uniqueness in Long's treatment traced simply from the fact that Long had put himself into a uniquely vulnerable position by first failing to punch out his timecard before leaving for lunch, and then not returning to his work area when the lunch period ended at 11:45 a.m. Specifically, by this combination of defaults, Long had left himself open to the special charge under Group 3, Rule 11 of ''failing [without permission] to adhere to the starting and quitting time for one's . . . lunch . . . .'' Moreover, contrary to the General Counsel's inconclusive observation, supra, it clearly appears from Whitley's ''paperwork'' that Long *did* do something the other March 17 strikers did *not* do—more precisely, he did *not* do something the other March 17 strikers *did* do— he failed to punch out his timecard before lunch. And Whitley clearly emphasized this point when he wrote on the suspension notice, ''you failed to return to your job assignment on time at the conclusion of your lunch without prior authorization of your supervisor and . . . without punching your time card.'' Finally, a 3-day suspension is the standard penalty for a ''second-offense'' violation of any ''Group 3'' rule, including said Rule 11.

Accordingly, after considering all of the foregoing, I can find no plausible basis for judging that the disciplinary actions taken by NASSCO against Long violated either Section 8(a)(3) or (1).

F. *March 19 Events*

As I have previously summarized, on Friday, March 19, again following an all union rally in the sandpit at lunchtime, 10 electricians represented by the Electrical Workers refused to resume working in their common department and went home for the balance of the day, making it clear, however, that they would return to work on Monday, their next scheduled workday. NASSCO treated their unpermitted early departures on Friday as violations of a ''Group 2 Rule,'' specifically, rule 6 in that group, which bans ''Leaving the plant during work hours without permission.'' Under NASSCO's Standard Rules of Conduct, a violation of any Group 2 Rule carries a ''first-offense'' penalty of a 3-day disciplinary suspension, and NASSCO imposed that penalty on all 10 electricians (and, as well, on three other workers represented by other unions who may have also participated in the March 19 afternoon walkout).[59]

The legality of the penalty NASSCO imposed on the 10 electricians depends on whether or not their March 19 walkout was an activity protected by Section 7. I have already found that it was not, but was instead another in the series of unprotected intermittent strikes orchestrated and encouraged by the Unions, all really aimed at pressuring NASSCO to improve its contract offer. Again, this conclusion is based not only on the facts I have found thus far, but on further circumstantial details which I narrate below. And as part of this narration, I will incidentally dispose of certain related 8(a)(1) counts in the complaint:

[58] And see R. Exh. 19, a copy of the ''warning'' Long received at that time for a '' First Offense.''

[59] The three other employees disciplined by NASSCO for violations of Group 2, Rule 6 on March 19 are not named in the complaint as victims of unlawful treatment and their individual circumstances are uncertain. Neither does the General Counsel address their discipline on brief.

1. Hinrichsen's allegedly unlawful threat in a letter to Zschiesche

On March 18, Hinrichsen signed a letter addressed to Zschiesche, which he mailed on the morning of March 19. This letter is the subject of complaint paragraph 14(e), which alleges in material part that, ''[o]n . . . March 19, . . . Hinrichsen, by letter, threatened employees with disciplinary action if they engaged in protected activities similar to the [March 17, after-lunch] rally.'' This is what Hinrichsen said in the disputed letter, with my emphasis on the passages that are the apparent targets of the count in question:

> On March 17, 1993 certain union leaders and you kept a group of employees off the job at the conclusion of the lunchbreak. While you elected to call this gathering a meeting, it was nothing more than a demonstration/rally to make noise over the lack of a profit sharing payout.
>
> We respect your rights to engage in protected activity and will continue to allow plant visitation for the purposes set forth in the agreements. [sic] We have also permitted you to talk with your members during lunch break in an orderly and peaceful manner. However, *we do not believe your rights extend to the use of Company property for the type of gathering that took place on March 17, 1993, particularly during regular work hours. Please be aware that we intend to enforce our work rules with respect to employees who fail to conform to Group 3, Rule 11 or any other appropriate rule.* Neither you nor any other official of any union is authorized to conduct rallies, demonstrations, or mass meetings in the yard during working time.
>
> In the event you or any other union leader engages in similar conduct we will re-examine our position with respect to plant visitation rights.

Despite testimonial conflict and lingering ambiguity in the record as to whether or not any ''employee'' ever saw this letter, I will assume for argument's sake that the two sentences emphasized above were at least *intended* by Hinrichsen as an implicit warning *to* employees *through* their union representative that NASSCO would regard any conduct similar to the March 17 stoppage as violations of company work rules, and would discipline participants accordingly. The General Counsel acknowledged during the trial that the lawfulness of this arguable ''threat'' depends on whether the in-plant work stoppage of March 17 was itself a protected activity. I have found that it was not. Consistent with earlier reasoning, I conclude that the threat in question, if ever read by any ''employee,'' was nevertheless a lawful warning that employees faced discipline under company work rules if they engaged in unprotected work stoppages similar to the one on March 17. Therefore, I find no merit to the count in complaint paragraph 14(e).

2. Prelunch walkout ''rumors'' on March 19; NASSCO's reactions the same morning

On the morning of March 19, talk began to circulate within the shipyard about some kind of walkout supposedly planned to occur at or after lunchtime. Two electricians who eventually became part of the 10-electrician walkout that afternoon, Dan Tyvoll and Dale Simpson, were the only participants in the walkout who were called as witnesses. They were also the only employee-witnesses who offered firsthand testimony concerning the existence of such ''rumors'' or ''plans'' on the morning of March 19.[60] Tyvoll and Simpson were part of a crew of 13 electricians assigned to a Navy vessel called the ''*AOE-6*,'' and they worked under the immediate supervision of an assistant general foreman at the time, Robert Root.

At about 8 a.m., Simpson admittedly overheard ''rumors from people working in the vicinity [whose names Simpson professed not to recall] . . . of a general walkout at lunchtime.'' And Tyvoll recalled somewhat more specifically that while working in a different area from Simpson he ''overheard some people [later identified by Tyvoll as Ironworkers-represented employees, whose names Tyvoll again claimed not to know or recall] . . . talking about leaving after the rally,'' and saying that ''a large number of people were going to the rally at lunch and then leave after lunch.'' Tyvoll also recalled that he made some kind of inquiry to one of the ''ironworkers,'' and that, ''in general, he [the ironworker] said that there was going to be a rally at the sand pit and that the ironworkers were talking about leaving after the rally.'' (Still later, Tyvoll clarified that he had somehow gleaned from these discussions that the plan was to leave only ''for the balance of the day,'' and was not intended to mark the start of any official strike.) On hearing of these plans, Tyvoll sought out another electrician, Eric Fleet, who was working in a nearby compartment, and the two electricians agreed that the walkout was an ''interesting concept,'' and would likely have a ''big impact.'' Somewhat later, as Tyvoll further recalled, Fleet came back to him and ''said that he had overheard more people talking about it and that it was sounding like it was really going to happen.''

NASSCO already knew from its monitoring of the closing moments of the March 17 demonstration/strike that some consensus appeared to have been reached among the participants to conduct some new kind of action on ''Friday.'' On Friday morning Hinrichsen started to hear reports of a walk-

[60] During cross-examination by NASSCO's counsel, Zschiesche, too, acknowledged that he had become aware of ''rumors'' of a Friday afternoon walkout, but that's about all he would admit to recalling. Thus:

> Q. Okay. So I take it, then, that . . . there was a rumor of a possible walkout on the Friday after March 17th.
>
> A. Yes, there was.
>
> Q. And that you assume that because of this rumor going around about a possible walkout, that was why the Company on that same day, Friday, March 19th, issued this Important Notice or General Counsel's 12, correct?
>
> A. Yes.
>
> Q. Okay. Now, where did you hear the rumor of a possible walkout?
>
> A. (No response.)
>
> Q. Well, let me help you. Did you and your union plan it?
>
> A. No.
>
> Q. You didn't?
>
> A. No.
>
> Q. Well, where did you hear it?
>
> A. Down at the yard.
>
> Q. Where?
>
> A. I don't recall.
>
> Q. From who?
>
> A. I don't recall.

out plan in calls from department supervisors. The reports echoed what Tyvoll and Simpson said they had heard—or ''overheard''—being discussed by workers themselves. Hinrichsen eventually got a call from D.A. Spanninga, NASSCO's vice president in charge of production, who also reported that his supervisors had been hearing of a planned ''mass exodus'' that afternoon.

Based on these reports, and with the events of March 17 obviously still fresh in mind, Hinrichsen published an ''Important Notice'' bulletin in English and Spanish, which his assistants, including Breece, began to distribute to union agents and employees shortly before and during the lunchtime rally.[61] In his bulletin, Hinrichsen summarized the terms and penalty for a violation of ''Group 2, Rule 6'' (3-day suspension for ''leaving the plant during working hours without permission''), and he further announced as follows:

> This rule means that if you leave the plant at lunch time, or at any other time, and do not have your supervisor's permission not to return to work, you will be suspended for three (3) work days without pay.
>
> All NASSCO employees are required to return to work after lunch today.

Separately, at Hinrichsen's direction, Spanninga prepared an ''Internal Distribution Memo'' (IDM) to department supervisors, and caused it to be distributed to supervisors at around 11 a.m. Spanninga's IDM, captioned, ''Requests for Excused Absences for 3/19/93,'' said this:

> There will be no excused absences the afternoon of Friday, March 19. There is work in the shipyard; therefore, we expect all of the employees who reported to work today to work the full shift. Please take the appropriate action to document any employee who leaves today before the end of the shift and does not return or returns late, and provide that information to my office.
>
> Timecards are to be given to employees who request them during the day as per our normal procedure. They should not be signed if requested prior to end of shift.

3. Immediate, prelunch conversations; the sandpit rally; the after-lunch walkout by 10 electricians

The only witnesses to these events who were called to testify with any particularity about them were electricians Tyvoll and Simpson and their supervisor, Root. While these three agree on many facts, they did not have identical memories, and in a few instances they contradicted one another as to particulars. Nevertheless, blending the agreed-on (or not clearly disputed) features in their respective accounts, and ignoring discrepant versions, I find as follows.

Sometime around 11 a.m., Tom Carl, NASSCO's ''Ship Manager'' for the AOE-6 work, called together the foremen of the various AOE-6 crews, including Root. He told the supervisors about the rumored afternoon walkout, and passed out copies of Spanninga's ''no-excused-absences'' IDM, supra. Shortly thereafter, and shortly before the 11:15 lunch break, Tyvoll and Fleet came to Root in his office, and, in Simpson's presence, told Root they intended to go to the lunchtime rally. Tyvoll also mentioned the rumored walkout, telling Root, ''It may be kind of dead around the ship'' after lunch. Root admittedly produced a copy of Spanninga's memo and showed it to Tyvoll and Fleet, and warned them to ''make sure they were back to work on time,'' because ''somebody'' (perhaps he named Spanninga, as Tyvoll insists) would be at the ''brow'' of the *AOE-6* ''taking names'' of any late returnees.[62] Tyvoll or Fleet then protested that the Company ''can't change their policy on a whim like that,'' and left Root's office to attend the sandpit rally.

Crediting Tyvoll's uncontradicted recollection of what happened next, I find as follows: Once he and Fleet arrived at the sandpit, Tyvoll was surprised that ''the turnout wasn't as large as [he] was expecting.'' He and Fleet then sat down while Fleet ate his lunch, positioning themselves so far away from the speakers, however, that they ''couldn't hear very well what was being said.'' Nevertheless, Tyvoll ''remember[ed] specifically,'' and I find, that ''Mr. Godinez was holding up the memo'' and saying ''something along the lines that it was a scare tactic and the Company couldn't do anything to you if you wanted to leave.''[63] (Later, describing the same moment, Tyvoll said, ''I just remember that he [Godinez] had a memo and he said it was a scare tactic by the Company and that they can't do anything to you if you want to leave at the end of the rally.'') From these elements of Tyvoll's account, I find that even if the Unions' top strategists were not themselves the original authors and chief mongers of the ''rumors'' of a planned walkout (and on this record I could easily so infer), one of their chief spokespersons, Godinez, nevertheless effectively embraced and ratified the rumored plan for a walkout when he gave assurances

[61] Also, Hinrichsen instructed Breece to leave copies of his bulletin with the guards at gate 6, for distribution to any workers leaving the shipyard at lunchtime, and the 10 electricians who walked out after lunch received copies as they exited. I note further that Hinrichsen's bulletin—as distinguished from his March 19 ''letter'' to Zschiesche, supra—is not challenged by the complaint.

[62] I specifically reject as contextually unlikely and as an embellishment Tyvoll's unique recollection that, as part of this same direction, Root ''told us he would advise us not to *go to the rally*.'' (Emphasis added.) Simpson, who testified that he was present during this exchange, could not recall any such advice, and Root denied that he gave any such advice. In this regard, I note that par. 15 of the complaint alleges, ''On or about March 19, 1993 . . . Root . . . threatened employees with unspecified reprisals if they engaged in union activities or other protected concerted activities.'' If par. 15 relies on the just discredited feature of Tyvoll's testimony (and this clearly appears to be so; see G.C. Br. at p. 39), I would dismiss that count for want of reliable proof. If, on the other hand, that count was intended more fundamentally as a challenge to NASSCO's right, through Root, to ''warn'' Tyvoll and Fleet of the consequences if they were to return *late* from the rally, such a challenge would seem to be grounded in a legal premise that I cannot embrace—that the afternoon walkout was itself protected activity, and, therefore, that NASSCO had no right to ''warn'' participants or potential participants in such a walkout that they were vulnerable to discipline. Accordingly, I would dismiss any such claim as being legally unsound in the circumstances.

[63] Contrary to Tyvoll's supposition, I find from Godinez' own testimony and from the known surrounding circumstances that the ''memo'' Godinez was brandishing and dismissing as a ''scare tactic'' was a copy of Hinrichsen's ''Important Notice'' bulletin—not Spanninga's IDM. The former was clearly distributed to workers and union representatives at the sandpit, including to Godinez; however, so far as this record shows, the latter was never passed out to any employees or union officials.

to the workers that they had every right to go home after the rally if they wanted to, and that the warnings in Hinrichsen's ''Important Notice'' bulletin were merely ''scare tactics.''

Having received this encouragement (and apparently still believing from all they had seen and heard to that point that workers from various trades still intended to go through with a planned walkout), Tyvoll and Fleet got up and left the rally before it ended, agreeing with each other as they returned to the *AOE-6* that they ''were going to leave.'' They arrived back at their department office on the *AOE-6* at about 11:40 p.m., rejoining the rest of the electrical crew who had remained to eat lunch. Root was not immediately present, and Tyvoll and Fleet quickly reported to the other electricians what had happened at the rally and how they felt about it,[64] and also mentioned Spanninga's IDM, which Root had showed them before lunch. Tyvoll and Fleet also told the rest, however, that they had decided to go home for the day. About four other electricians said they likewise intended to go home. Root soon returned, and called the (now 12) electricians in the crew together for a meeting.

In this meeting, Root told the electricians that they would be subject to discipline if they left the yard, and showed them a copy of Spanninga's IDM and read aloud from it, emphasizing that there would be no excused absences that afternoon. There followed a period during which, according to Tyvoll, ''people . . . discussed their frustrations with the Company . . . and how they felt that the Company was trying to bust the unions and they were very discouraged over the way the Company was handling it.''[65] (Tyvoll later agreed that these complaints were linked to the protracted contract bargaining impasse and to NASSCO's perceived intransigence at the bargaining table.) It is not clear whether the contents of Spanninga's IDM became the subject of any of these complaints, but there seems to be no dispute that, at one point, someone pointed out that Root had already permitted one electrician in their crew, Terrasas, to take the afternoon off. (Crediting Root, I find that Root had agreed several days earlier to Terrasas' request for time off on Friday afternoon to go to a medical appointment, after Terrasas had presented an appointment slip; and Terrasas had already left the yard at the start of the Friday lunch period, and had punched out, and Root had ''signed'' Terrasas' timecard, indicating an ''excused absence.'') After Root had ''heard . . . out'' these complaints, as Tyvoll recalled, about ''five or six'' of the electricians looked inquiringly at Tyvoll, who declared, ''I'm still leaving,'' and asked Root for his timecard. Fleet did the same, and was quickly joined by eight other electricians.[66] Root then left the group and conferred briefly with his own supervisor, Carl, then returned and told the 10 departers that he would give them their timecards but would not ''sign'' them.

I also find, crediting Root's specific memory on this point, that Root ''told them [the departers] they would be disciplined and they said they didn't care, that they would let the union take care of it.'' I find further, as all witnesses roughly agree, that as the 10 electricians punched out their (unsigned) cards and exited the area, several made remarks to Root to the effect, ''Don't take this personally, it's not against you. We'll see you on Monday.''

G. *Lawfulness of Disciplinary Suspensions Related to the March 19 Walkout*

It doesn't seem necessary to reiterate by now obvious points, except summarily: If the electricians' walkout had genuinely arisen solely as a one-time strike of however short duration to protest an unwanted condition of employment, it might readily be found to enjoy Section 7's protections, and NASSCO's disciplinary actions against participants might just as readily be found to be legally unprivileged, no matter that the Company had a ''rule'' that the employees had arguably ''violated'' by their walkout. By parity of reasoning, if the walkout were construed as merely one more in a series of intermittent strike actions promoted by the Unions with the overriding, ulterior aim of getting a better contract offer from NASSCO, it was unprotected, and NASSCO had a right to treat it as a violation of published plant rules, and to apply the published penalties.

The General Counsel, relying largely on claims by Tyvoll—themselves only faintly supported by Simpson—argues on brief (p. 36) that the electricians' walkout was a ''classic case of spontaneous detonation,'' supposedly triggered by a bitterly resented ''change'' in the rules, specifically a ''change'' perceived to be implicit in Spanninga's IDM. Based on considerations I discuss next, I cannot agree. Indeed, I doubt in the first place that the electricians genuinely entertained the belief that Spanninga's IDM represented some ''change'' in the rules, and I doubt even more strongly in any case that any such perceived change was a motivating factor in their walkout.

I start with a familiar reminder about ''motives'' and ''inferences,'' set forth in a passage of the Ninth Circuit's decision in *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (1966), which is cited regularly and approvingly in the Board's own decisional annals. There (id. at 470), the circuit court noted that when,

> [a]ctual motive, a state of mind, [is in] question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. . . . Nor is the trier of fact—here the trial examiner—required to be any more naif than is a judge. If he finds that the stated motive . . . is false, he certainly can infer that there is another motive. More than that, he can infer that the

[64] It is reasonably clear from Tyvoll's testimony that he and Fleet reported to the other electricians what had happened at the rally. Thus, Tyvoll testified at one point that he and Tyvoll told the waiting electricians ''that we went to the rally . . .'' and later testified that ''they [the waiting electricians] were actually looking to us for information since we had gone to the rally.'' Moreover, considering all the circumstances, I deem it likely, and therefore find, that Tyvoll and Fleet told the electricians about Godinez' assurance that the Company was simply engaging in ''scare tactics,'' and couldn't do anything to them if they wanted to go home after the rally.

[65] I credit Root that most of these complaints and expressions of dissatisfaction were voiced by Tyvoll himself, acting as ''spokesman'' for the others.

[66] The eight besides Tyvoll and Fleet were, Dale Simpson, M. L. De Guzman, J. A. Kass, C. C. Navarro, L. F. Phillip, L. M. Quigley, J. C. Uriarte, and G. A. Wright.

> motive is one that [the declarer] desires to conceal . . . .[67]

Contrary to the General Counsel's interpretation of the motivational dynamics at the heart of the walkout, I find it reasonably clear from the totality of known circumstances that whatever ''change'' the 10 electricians may have perceived in Spanninga's IDM had essentially nothing to do with their walkout, and was offered as a mere afterthought—and then only through Tyvoll, standing supposedly as a representative for the whole class.[68] First, I can find no rational support in the record for Tyvoll's claimed belief that Spanninga's IDM implied such a ''change.''[69] And because I found Tyvoll to be otherwise rational—evidenced in part by the adroit way he shaped his testimony to emphasize Spanninga's IDM as the walkout trigger—I think his claimed belief was insincere, advanced only to obscure what otherwise is obvious or can easily be inferred from his own testimony and the way he delivered it: Tyvoll, a good union man, frustrated by nearly 6 months of operating without a contract that the Unions could accept, and clearly ''interested'' by the ''concept'' of the anticipated ''big-impact'' walkout on March 19, *wanted to be part of that walkout*, and had formed that desire *before* he ever saw Spanninga's IDM. Moreover, he had been reassured by Godinez at lunchtime that company threats of punishment for going home were so much hot air, and he and others clearly took Godinez' assurances seriously; for when they walked out they replied to Root's warning of discipline with expressions of indifference, and of confidence that ''the union'' would ''take care of it.''

Thus, if I take Tyvoll as he was proferred, as truly representative of the class in terms of each member's motivation for the walkout, I would find that all the electricians who walked out were equally good union men, equally frustrated with the contract impasse, and equally motivated to assist the unions' overall contract strategy by joining in a calculatedly brief strike, especially when union leaders were telling them they had every right to go home without fear of punishment. In short, the 10 electricians were willingly part of the unions' inside-game strategy, and they decided to walk out in furtherance of that strategy—not because they perceived some ''change'' in the company's application of its work rules based on company announcements on March 19, themselves published in *response* to the rumors of yet another job action that day.

As I have previously noted, it appears that no more than three workers from other unions may have likewise joined in the much-rumored walkout, even though Godinez had obviously tried by his ''scare tactics'' announcement during the sparsely attended lunchtime rally to boost participation in the walkout. Thus, the 10 electricians were proved wrong insofar as they may have anticipated when they walked out that they would be joining throngs of Ironworkers and members of other unions in a ''big impact'' walkout. But this error in prediction as to the actual scope and impact of the walkout, however ironic or poignant, does not cause me to revise my findings concerning the electricians' motivations in the first instance for walking out.

I note, moreover, that the complaint did not allege, and the General Counsel does not directly argue, that there was anything unlawfully unilateral or discriminatory about the supposed ''change'' in the rules implicit in Spanninga's IDM. Nor could I construe the IDM (or Hinrichsen's ''Important-Notice'' bulletin) as implying any change in established company practice. Rather, adapting the reasoning and language of *Bath Iron Works Corp*., 302 NLRB 898, 901 (1991), I would find that NASSCO made no palpable ''changes'' at all, much less ''material, substantial, and significant'' ones, when, under less-than-normal circumstances, it published through the IDM and Hinrichsen's bulletin what amounted to ''merely particularizations of, or delineations of means for carrying out, an established rule or practice.''[70]

In sum, I have found that the electricians' walkout was done to further the unions' overall, intermittent-strike strategy, and was encouraged by a top union spokesperson, Godinez, and was not an independent and ''spontaneous,'' ad hoc protest over some imagined ''change'' in the rules on March 19. Accordingly, I conclude as a matter of law that NASSCO committed no violation when it treated the walkout

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[67] Of course, the Ninth Circuit was talking in that case about an employer's motive in a discharge case; but the court's reminders clearly apply whenever the motives of anyone are a relevant subject of inquiry in any case—including cases, like this one, where the motives of employees, or the unions who lead them, are legitimately in question. And see *Mike Yurosek & Son*, supra, 310 NLRB at 831:

> How an employee subjectively characterizes his or her own actions is not determinative in the Board's objective analysis of whether that employee has engaged in protected, concerted activity.

[68] Simpson, the only other walkout participant called as a witness, insisted by contrast that what *he* was protesting was the ''discrimination'' he perceived in the fact that Root had already approved Terrasas' departure for a medical appointment, but was now telling the rest of the crew that he would not approve their own departures. I observe that if there was ''discrimination'' in this regard, it was a discrimination rooted in well-understood distinctions and practices within the shipyard, under which workers who had cleared their intended absence with their supervisor days in advance would be treated as ''excused,'' whereas workers who simply walked out without advance notice or clearance would not be accorded such ''excused'' status. Accordingly, I don't take seriously that Simpson or any of the other electricians bent on walking out genuinely experienced a sense of *unfair* discrimination simply because Tarrasas' departure had been worked out and excused days earlier, whereas their own intended one would not be excused.

[69] Tyvoll was no longer employed by NASSCO when he testified, and he had worked only about 21 months for NASSCO before leaving the Company in June 1993. He was invited on the witness stand to identify in what way Spanninga's IDM could be understood as a ''change in policy.'' His attempts to do so were confused and inconsistent, and entirely unconvincing insofar as he occasionally tried to claim, contrary to findings, supra, that, under the prevailing practice, supervisors would routinely and perfunctorily ''excuse'' the absence of any employee who asked to leave work early, for any reason, at any time. Moreover, I note that Zschiesche unguardedly conceded that he could not detect in Spanninga's IDM nor in Hinrichsen's important notice bulletin any ''change'' in the traditional application of the Company's Standard Rules of Conduct.

[70] And see, *Trading Port*, 224 NLRB 980 (1976), which the *Bath Iron Works* Board characterized as a case where the employer had installed ''a timing device to measure more accurately employees' productivity against previously established . . . standards,'' and relatedly, had ''tighten[ed] . . . the application of existing disciplinary sanctions.'' The *Bath Iron* Board further noted regarding *Trading Port's* facts that, ''[t]he standards themselves and the sanctions remained the same as before; thus the employer had made no significant, substantive change in the status quo . . . .'' 302 NLRB at 901, discussing 224 NLRB at 983–984.

as a violation of an established rule barring leaving the shipyard during work hours without permission, and imposed the published penalty against the 10 electricians who walked out.

IV. THE LAWFULNESS OF NASSCO'S VARIOUS ''SURVEILLANCE'' ACTIONS

A. *Conduct Challenged by the Complaint*

The ultimate complaint alleges that NASSCO violated Section 8(a)(1) by maintaining certain kinds of technological ''surveillance'' over union or other protected activities conducted by employees on its premises. I have already narrated many of the relevant facts; I will incidentally record others below as I address the issues raised by the complaint, which alleges in pertinent counts as follows:

> [para. 13]: On various occasions, in . . . late February through April 1993, and again since late October 1993, NASSCO, through [Hutchins],[71] Breece, and other unknown agents engaged in unlawful surveillance of employee rallies and demonstrations conducted by [the unions] . . . with still cameras, videotape cameras, directional microphones, and sound recording equipment.
>
> [para. 17]: On or about September 16, 1993 . . . Hutchins, and Pittman and Workman, engaged in unlawful surveillance of an employee rally and/ or created the impression of surveillance of an employee rally.

It helps to be clear at the outset about which kinds of ''surveillance'' practiced by NASSCO are in question in this prosecution. Although the complaint itself is somewhat indefinite, the General Counsel's brief leaves little room for doubt: The prosecution is clearly attacking NASSCO's *purposeful* videotaping and sound recording of Gate 6 union rallies, and its similarly purposeful recording by video/audio gear and still cameras of other union activities within the shipyard during certain loosely defined periods, i.e., ''. . . various occasions in . . . late February through April 1993, and again since late October 1993.'' In a few instances, moreover, the General Counsel contends that the mere display of video gear by NASSCO agents created an unlawful ''impression of surveillance.'' More specifically still, it appears that the General Counsel's challenges are addressed to the following alleged (and mostly admitted) activity:0

1. Security Captain Hutchins' admitted use of portable video/audio gear to record many rallies at Gate 6 in ''early March'' and until they ceased in June.

2. Hutchins' use of the same equipment to record the demonstration/strike in front of Ball's office after lunch on March 17.

3. Production Foreman Ball's admitted use of a Polaroid, still photo camera to take snapshots of the demonstrators arrayed below him after lunch on March 17.

4. Industrial Relations staffer Breece's admitted carrying of a video camera while he observed some morning rallies at Gate 6 from the guardhouse area in March, and his admitted ''pointing'' of the camera on at least one occasion at workers entering the yard after such a rally.

5. The actions of Industrial Relations staffers Pittman and Workman in standing nearby and observing an all-union sandpit rally at lunchtime on September 16. Here, there is only one relevant factual dispute—whether or not Pittman and Workman, in addition to merely ''observing'' this rally from the nearby lunch shed, actually took ''notes'' on notepads or clipboards one or both of them may have carried. Zschiesche and Godinez each testified that either Workman or Pittman ''appeared'' to be taking notes, but there is no independent corroboration of this from employee-participants in the rally. Both Zschiesche and Godinez showed remarkably frail and selective memories in general, and I retain substantial doubts about the credibility of their recollections in this instance, which struck me as attempts to gild the lily. Accordingly, I find that Workman and Pittman, following Hinrichsen's instructions that he wasn't ''interested in names,'' but merely wanted his staffers to ''just kind of keep an eye on [the rally] and let me know whether or not anything got out of hand,'' did not go beyond merely ''observing'' the rally, which, in the event, was peaceful.

6. Hutchins' admitted carrying of a case containing video gear as he likewise observed the September 16 rally at the sandpit.

7. Certain innovations introduced by NASSCO ''since late October,'' as follows:

> (a) NASSCO's introduction in late October of a new, fixed video camera atop Building 15—this one with a microphone feature, as well—to supplement the two, video-only security cameras already monitoring the Gate 6 area from atop Building 15. Hinrichsen told the unions in writing that the new camera on Building 15, like others being installed in a parking lot across the street, ''. . . will be monitoring[,] only[,] but will have the ability to video tape if the security officers believe conditions are such that a record is needed.''
>
> (b) A refinement in early February 1994 in the audio pickup capabilities of the new system atop Building 15, specifically, the installation of a concealed microphone halfway down an ivy covered wall on the street side of Building 15, near Gate 6, which was connected by green painted conduit to the new, roof mounted camera, and, in turn, to the video/audio monitors in NASSCO's Security Department offices. Although it is reasonably clear that this refinement was intended to make things being said in rallies at Gate 6 more audible to company listeners-in, the early February microphone refinement was in any case a shortlived one: Hinrichsen, claiming to be unaware of the newly located microphone until receiving a union protest about it during a bargaining session on February 11, ordered soon thereafter that the microphone was to be dismantled, and it was, leaving the new camera with no audio pickup capability after this dismantling. The new camera was never itself removed, however; but so far as this record shows, it now operates on ''autoscan,'' a preprogrammed series of sweeps and stops in and around Gate 6.

It also helps to be clear about which forms of ''surveillance'' practiced by NASSCO are *not* in question: As far as I can discern from the complaint and the General Counsel's brief, the prosecution does not attack the kind of continuous, routine, ''plant-protection'' surveillance NASSCO has prac-

[71] Hutchins' name is incorrectly rendered as *Hutchinson* in the ultimate complaint.

ticed for many years by means of fixed location video cameras having no audio recording features. In summary, these are the facts: Prior to late October, NASSCO operated an integrated system of nine video cameras affixed to the roofs or walls of buildings surrounding or within the shipyard—including two atop building 15, adjacent to gate 6—whose images are transmitted via closed circuit to a Security Department office where they are monitored on video screens by security personnel throughout each day. Moreover, in late October, NASSCO ''upgraded'' this system by installing a new set of video only cameras on lighting poles in the parking lots across the road from gate 6. Although the General Counsel attacks the new camera/microphone on building 15, supra, nominally introduced as part of the foregoing upgrade, I detect no particular challenge by the General Counsel to NASSCO's introduction or use of the parking lot cameras. Accordingly, subject to special questions raised by NASSCO's introduction in late October of the new camera/microphone system on building 15, I regard as beyond the reach of this prosecution the kinds of routine, ''passive,'' video only surveillance of shipyard entrances and other areas which NASSCO has traditionally used as part of its plant protection security system, and I include in this class the new set of parking lot cameras which have become part of that system.

B. *Controlling Legal Principles*

The governing principles are set forth in *F. W. Woolworth Co*., 310 NLRB 1197 (1993). There, the Board (Member Oviatt dissenting in part) sustained the administrative law judge's finding that the employer violated Section 8(a)(1) by ''photographing and videotaping off-duty employees . . . engaged in protected union activities when they stationed themselves in the general area of the Respondent's store entrances in order to distribute handbills to potential customers and appeal to them to shop elsewhere during the labor dispute with the Respondent.'' 310 NLRB at 1197. The Board said as follows (ibid):

> . . . the Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate. *Waco Inc*., 273 NLRB 746, 747 (1984), and cases cited therein. Here, the record provides no basis for the Respondent reasonably to have anticipated misconduct by those handbilling, and there is no evidence that misconduct did, in fact, occur. Unlike our dissenting colleague, we adhere to the principle that photographing in the mere belief that ''something 'might' happen does not justify Respondent's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity.'' *Flambeau Plastics Corp*., 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128, 136 (7th Cir. 1968). Accord: *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976) (''the Board may properly require a company to provide solid justification for its resort to anticipatory photographing'').
>
> In addition, we disagree with our dissenting colleague's reliance on the Third Circuit's *United States Steel* decision, which denied enforcement of a Board Order. *United States Steel Corp. v. NLRB*, 682 F.2d 98 (3d Cir. 1982), denying enf. to 255 NLRB 1338 (1981). In *United States Steel*, the Board held that the fact that the employees publicized their activities is entitled to ''little weight,'' and the Board has continued to cite its decision with approval. *John Ascuaga's Nugget*, 298 NLRB 524 fn. 3, 554 (1990), enfd. in relevant part 968 F.2d 991 (9th Cir. 1992). Finally, the cases our dissenting colleague cites in footnote 2 of his dissent are not ''analogous'' because they are based on the principle that an employer's ''mere observation'' of open, public union activity on or near its property does not constitute unlawful surveillance.[72] When an employer's surveillance activity constitutes more than ''mere observation,'' the Board has found a violation of the Act. E.g., *Gupta Permold Corp*., 289 NLRB 1234, fn. 2 (1988); *Baddour*, 281 NLRB 546, 548 (1986), enfd. 848 F.2d 193 (6th Cir. 1988). Photographing and videotaping clearly constitute more than ''mere observation'' because such pictorial recordkeeping tends to create fear among employees of future reprisals. *Waco*, supra.

With the foregoing principles in mind, I address next the particular instances listed above of NASSCO's surveillance attacked by the complaint, but in somewhat different order, and in some cases with supplemental findings relevant either to the prosecution's claims or to NASSCO's claims of ''justification'' for each form of activity:

C. *Photographing and Videotaping of After-Lunch Strike on March 17*

The principles discussed and reaffirmed by the Board in *F. W. Woolworth*, supra, apply in the first instance only when an employer does ''pictorial recordkeeping'' of concerted activity by employees which is *protected* by Section 7; perforce, they do not apply to recording of incidents of unprotected employee misconduct, concerted or not.[73] The March 17 demonstration/strike was unprotected. Thus, I see no need to explore the matter of NASSCO's ''justification'' for its recording of this job action. I simply find that when NASSCO openly recorded what it honestly (and correctly) believed was unprotected, on-premises misconduct by employees during scheduled working hours, its actions did not implicate any rights under Section 7; and, therefore, it committed no violation of Section 8(a)(1).[74]

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[72] In his dissent (id. at 1198, fn. 2), Member Oviatt cited in this regard, *Chemtronics, Inc*., 236 NLRB 178 (1978), *Hoschton Garment Co*., 279 NLRB 565, 566 (1986), and *Harry M. Stevens, Inc*., 277 NLRB 276 (1985).

[73] And see, e.g., *Summitville Tiles*, 300 NLRB 64, 70 (1990).

[74] While I am not certain it is required, my analysis of this issue is intended to be consistent with the analytical and burden-of-coming-forward schemes set forth in *Rubin Bros. Footwear*, 99 NLRB 610, 611 (1952), approved in *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), for judging the lawfulness of an employer's actions against employees who, ''in the course of'' engaging in protected activities are ''honestly believed'' by the employer to have committed unprotected acts of misconduct. Under those authorities, the employer's ''honest belief'' of misconduct is a sufficient defense, *unless* the General Counsel can establish by a preponderance of the credible evidence that the employees were not, ''in fact,'' guilty of

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D. *''Mere Observation'' Of On-Premises Union Rallies*

In *F. W. Woolworth*, supra, the Board majority did not disturb, but only distinguished, certain cases cited in the dissent which were (as the majority stated) ''based on the principle that an employer's 'mere observation' of open, public union activity on or near its property does not constitute unlawful surveillance.'' Therefore, I assume that the quoted principle is itself good law. The unions' rallies at Gate 6 and at the sandpit, including on September 16, were clearly examples of such ''open, public union activity.'' Therefore, NASSCO's agents (Hutchins, Breece, Pittman, and Workman) who were variously assigned to—and admittedly did—''observe'' these rallies, committed no violation by such conduct, standing alone. (For reasons I discuss further below, however, I reach a different conclusion regarding Hutchins' admitted display of a case obviously containing video recording gear while he observed the September 16 rally in the sandpit, and likewise regarding Breece's admitted display in March of video gear while monitoring the activities of ralliers at gate 6.)

E. *Videotaping of Gate 6 Rallies; NASSCO's Justifications*

1. Introduction

Hutchins, acting at the ''suggestion'' of NASSCO's Vice-President and CFO, Hallett, admittedly began sometime in early March to use portable video/audio gear to record morning rallies at Gate 6. He admittedly continued to do so on a more-or-less regular basis until sometime in June, when the Gate 6 rallies themselves were discontinued. (They were resumed by the unions in late September, but after this resumption, neither Hutchins nor any other NASSCO agent used any *portable* video/audio equipment to record them.) In the early days or weeks of his recording activity in March, Hutchins operated the tripod-mounted recording equipment himself, from the roof of building 15, as he did during the morning rally of March 17, supra. However, as time wore on, and nothing appeared to be happening at these rallies of any particular security concern to NASSCO, Hutchins eventually just left the equipment standing on the roof, where it was timed to go on and off at prescribed intervals associated with shift change times. NASSCO kept the tapes of these recorded rallies, but the tape of the March 17 morning rally at gate 6 is the only one of them it offered into evidence. I presume that NASSCO did not submit any other such tapes because they disclosed nothing that would support NASSCO's professed concern, discussed infra, that the rallies would be venues for possible violence or other illegal or unprotected activities.

It is the purposeful recording of these rallies by Hutchins that most obviously implicates the holdings of *F. W. Woolworth*, supra. For, on this record, the rallies at all times were clearly a form of, and a forum for, union or other concerted employee activity protected by the Act, and there is no evidence that participants in the rallies ever committed any violent or otherwise illegal or unprotected acts in the course of their participation.[75] Clearly, therefore, NASSCO was engaging in what the Seventh Circuit referred to in *NLRB v. Colonial Haven Nursing Home*, supra, as ''anticipatory'' recording, and thus it fell to NASSCO to provide ''solid justification'' for its intentional video/audio surveillance of Gate 6 rallies. Id.

NASSCO sought to meet this burden by introducing evidence of both contemporaneous and remote events and circumstances which are not themselves in dispute. I will summarize next the range of NASSCO's credible showings in this regard.

2. History of photographing and videotaping of ''open'' union activities at gate 6

Hutchins' videotaping at gate 6 in the spring of 1993 was hardly the first time that he or other NASSCO agents had used video and still photo cameras to openly record union rallies and related picketing or strike activities in the gate 6 area. Hutchins had used a hand-held video camera for such purposes during the 3-week strike in October 1992, and other NASSCO agents had used similar equipment for similar purposes during previous periods of strikes or labor unrest dating back to 1980. Moreover, so far as this record shows, none of the unions had ever previously objected to such ad hoc documenting by the company of their openly conducted rallies or strike-related picketing at gate 6. To the contrary, Godinez, and Zschiesche substantially admitted, consistent with the record as a whole, that the unions were not just aware of NASSCO's historical recording of some union activities at gate 6, but had come to count on it, and to use such recording as a way of communicating various ''messages'' back to NASSCO's principals. In addition, the unions were not shy about publicizing their activities at gate 6; Zschiesche brought in the media during a demonstration on April 29 at gate 6 associated with the first of the unprotected, 1-day strikes, and conducted a live broadcast interview from that site with a local radio station reporter.

3. History of violence during periods of labor unrest

Hinrichsen credibly testified that strikes at the shipyard since 1980 were invariably accompanied by some acts of violence or other unprotected or unlawful activities, some of them at or near gate 6. In this regard, Hinrichsen testified in summary terms that during the October 1992 strike he either personally observed, or got reports of, mass picketing at gate 6 and other employee entrances, tire slashings of cars in employee parking lots directly in front of or across the street from gate 6, and spreading of tire deflating barbs in the same lots. (Also, in one vaguely recalled incident associated with the October 1992 strike, Hinrichsen testified that he had gotten a report that someone wielding a baseball bat had chased someone else.) Hinrichsen also testified in similarly summary

the supposed misconduct. Here, NASSCO met the honest-belief test, and the General Counsel did not establish that the employees were not guilty of the supposed misconduct being taped and photographed.

[75] For these purposes, I distinguish between, on the one hand, a union ''call'' made during an otherwise protected union rally for employees to engage at a later time in unprotected activity, and, on the other, the actual commission of unprotected or illegal acts during such a rally. McCammon's instruction to employees before work on March 17 to ''punch-out'' before attending the lunchtime sandpit rally was a clear example of the former; indeed it was the only example of record. And there is no evidence whatsoever of any conduct of the latter type.

terms that similar kinds of misconduct had occurred during previous strikes over new contracts in 1988, 1984, and 1981.

NASSCO went to more particular lengths, however, to establish through Hinrichsen that in-plant violence and unprotected job actions had occurred during a memorable period in 1980 when labor agreements containing no-strike clauses had not yet expired. Crediting Hinrichsen's undisputed account of the 1980 disturbances, I find as follows: The first such action was a sickout on April 1, 1980, apparently in aid of midcontract demands by the Ironworkers and perhaps other unions to reopen the contract to negotiate wage increases, demands which NASSCO was refusing to entertain. Then, in July 1990, as these reopener demands intensified, a number of workers marched into the sheet metal shop, where they banged tools on benches and called for the shop superintendent, who came out and was then allegedly assaulted by an Ironworkers shop steward, Steve Crain, who was then suspended by NASSCO, following which the Ironworkers' then-business agent threatened disruption of ''business as usual'' unless Crain were to be reinstated immediately. Then, in early August 1980, upwards of 80 union officials and employee-members, including current Ironworkers President and Chief Steward McCammon, disrupted a public ship launching ceremony at the yard: As a Navy undersecretary stood before a microphone on a platform loaded with other dignitaries, some of the demonstrators stood in front of the seated audience, shouting out questions and slogans. Then, others swarmed the platform, where one of them seized the microphone from the undersecretary, who withdrew, causing NASSCO to bring the ceremony to a premature close. In the following week, the Ironworkers and some other unions called a strike and began picketing, and effectively shut down the shipyard for 3 days before ending their ''wildcat'' action. During the 3-day wildcat strike, NASSCO fired three or four of the strikers, including two Ironworkers business agents, for alleged striker misconduct. A few weeks later, about a dozen workers who were part of a larger group at a gate 6 rally called to protest these dismissals suddenly left the rally and charged into the Industrial Relations building, breaking the glass door as the first of them entered. Inside, the breakaway group banged on walls, sprayed paint on file cabinets and walls, tore down signs, and split an interior door. Finally, on yet another occasion in ''mid-1980,'' ''a bunch of people'' participating in a rally or demonstration at gate 6 left the gate 6 area and marched to another entrance located down the street, where they first tore up sod and broke off sprinkler heads in a planted area at the entrance, and then ''stormed into the main lobby,'' where they remained for an uncertain length of time before withdrawing under uncertain circumstances.

4. Inside-game work stoppages, or threats thereof, in same period Hutchins was videotaping at gate 6

I have already thoroughly described how the unions, having announced in late February their intention to promote various, ''in-plant solidarity activities and other forms of resistance calculated to cause enough economic damage to make a concession-demanding Company reconsider,'' proceeded to implement that plan by orchestrating and encouraging employees to engage in at least six unprotected, intermittent strike actions between March 8 and June 23. I find that these tactics, plus union hints or threats or ''rumors'' that other such actions would take place, clearly were not just ''calculated'' to ''harass'' and ''confuse'' NASSCO (*United States Service Industries*, supra, 315 NLRB at 285), but that such tactics had that very effect, leaving the company wondering throughout the spring of 1993 what the unions might do next, and where they might do it.

5. Analysis and conclusions

NASSCO makes a variety of arguments linked to the foregoing facts: It asserts that its experience with violence during previous labor disputes was alone enough to justify its recording of gate 6 rallies beginning in early March. In addition, it argues that it had especially strong grounds for expecting a repetition of historical misconduct in the light of the unions' statements in leaflets and correspondence in late February and early March, containing thinly veiled threats of unusual ''forms of resistance'' (e.g., the ''The full dose . . . is soon to be here . . . Listen to the whistle as it will appear.''). Moreover, NASSCO notes that recording the activities at gate 6 would either provide ''evidence'' of any repetition of historical misconduct, or would at least have a ''calming influence'' on activities at gate 6. Finally, NASSCO makes much of the fact that the unions and the employee-participants in the unions' rallies had become accustomed to recording of gate 6 rallies and strike or picketing events at that location, and were, in fact, unfazed by Hutchins' taping activities. Although these arguments cannot be dismissed as frivolous, I cannot agree that they provide solid justification for the video/audio surveillance at issue. I will address them below in roughly reverse order.

I find at the outset that it deserves no weight as ''justification'' that the unions and the employees who participated in gate 6 rallies not only seemed bluffly indifferent to the recording of their activities, but had historically acquiesced in similar taping of their activities during previous labor disputes, and indeed, even seemed to court the company's taping of their rallies during the spring of 1993. While those who elected to participate in these renewed rallies in 1993 showed apparent bravado in the face of Hutchins' recording of their actions and statements, their individual, subjective reactions are irrelevant to the question at issue; for it is the inherent tendency of such recording to instill fear of future reprisal—and thus to deter employees who might otherwise wish to participate in such protected gatherings from joining them—that makes such conduct unlawful under Section 8(a)(1). *F. W. Woolworth*, supra. Neither could I find on this record that *all* of NASSCO's bargaining unit workers were as indifferent to the company's recording at gate 6 as were the handful of stalwarts who regularly participated in the rallies despite such recording. Similarly, under the majority's discussion in Woolworth, I am bound to accord ''little weight'' to the fact that Zschiesche—during the first of the unprotected, 1-day strikes in April—sought to ''publicize'' the action by calling in the local news media for an interview at or near gate 6.[76]

[76] NASSCO rides hard on the Third Circuit's reasoning in *United States Steel Corp. v. NLRB*, supra, assigning greater weight to the fact the union ''publicized'' its protest activities through the local media than the Board had assigned to this fact. The *F. W. Woolworth* majority reaffirmed that such evidence was deserving of ''lit-

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I think it likewise deserves little or no weight in a justification analysis that the presence of video cameras at the rallies might serve as a ''calming'' influence on the behavior of participants in the rallies. At the threshold, this argument begs the question, ''What was it about the rallies that needed 'calming?''' (On this record, the answer to that question is, ''Nothing.'') The argument also ignores, more fundamentally, that such taping is generally proscribed because of its inherent tendency to inhibit or deter employees from *participating* in protected activities, without regard to any ''calming'' influence the cameras may have on those who, despite their presence, have chosen to participate.[77]

Neither is Hutchins' videotaping at gate 6 justified simply because NASSCO may have reasonably anticipated that the unions were planning to promote unprotected job actions as part of their Inside-Game campaign. I accept that in early March, when Hutchins began to videotape the rallies, the company was wary of such actions by the unions, and had reason to be vigilant. However, the threat to NASSCO in the circumstances, to the extent it was reasonably identifiable, was a threat of ''in-plant'' actions—work stoppages, ''slowdowns,'' and the like. Thus, it would not have been reasonable for NASSCO to suppose that any such actions would, or *could*, occur at gate 6 itself, especially not at times when workers were gathered outside the shipyard before or after their scheduled working hours. Moreover, as I note further below, the rallies were being conducted in a nonstrike context, and therefore they did not raise the same concerns about violent or unprotected activities at gate 6 that arguably might have been raised if there had been picketing at gate 6 associated with a strike.

In *F. W. Woolworth*, supra, the Board expressly ''adhere[d] to the principle that photographing in the *mere* belief that ''something 'might' happen'' does not justify Respondent's conduct.'' 310 NLRB at 1197, emphasis added. But the Board also implied in the immediately preceding passage, supra, that if the respondent in that case had made a record that would support a claim of ''reasonabl[e] anticipat[ion]'' of misconduct, the photographing would have been lawful. The arguments I have disposed of so far, and the facts on which they are grounded, do not genuinely provide a reasonable basis for NASSCO to have anticipated that misconduct would occur at the gate 6 rallies. It remains to consider whether, as NASSCO argues, the ''history of violence during labor disputes'' is alone enough to justify NASSCO's taping of the rallies.

Here, NASSCO has shown that violence and related misconduct grew out of two rallies at gate 6 during an especially stormy period in 1980 marked by other acts of violence and misconduct at other locations within the shipyard. It has also shown that some acts of violence or misconduct arose during strikes and related picketing activities in the ensuing 12 years, including during the October 1992 strike. Was this enough? The General Counsel says it wasn't, and seems to rely on *Holyoke Visiting Nurses Assn.*, supra, as the controlling precedent. NASSCO says it was, and seems to rely on *Bozzutto's, Inc*., 277 NLRB 977 (1985) as its principal authority. Contrary to both parties, I find that neither of those cases clearly disposes of the question; nor have I found clear guidance in any other cases I have combed with this question in mind.

In *Holyoke*, supra, the Board was unpersuaded by the employer's attempt to justify its videotaping of current, peaceful, strike-related picketing on the basis of one event of picketline ''misconduct'' during a strike 10 years earlier (bringing a union supportive patient of the health care employer onto the picket line in a wheelchair belonging to the employer), plus generalized fears of violence during *any* strike, even though sincerely grounded in the personal experience of the employer's attorney during strikes involving other employers. Id. at 1050–1051. (As I have previously noted, the *Holyoke* Board was likewise unmoved by the employer's argument that videotaping is a ''tremendous, POSITIVE, preventive tool for stopping violent acts or property damage.'' Id. at 1040.) Clearly, however, NASSCO's showing included testimony from Hinrichsen indicating, however summarily, that misconduct occurred not just in temporally remote periods in 1980, but during each succeeding strike for a new contract, including one as ''recent'' as the October 1992 strike. And for this reason, I would find *Holyoke* to be factually distinguishable from this case.

NASSCO places heavy emphasis on *Bozzutto's, Inc*., 277 NLRB 977 (1985) as a case where the Board affirmatively held that violence in prior strikes legitimized an employer's videotaping and photographing of so-far-peaceful employee picketing during a current strike. Indeed, this is the only case among many cited by NASSCO containing such a direct holding. In *Bozzutto's*, the administrative law judge noted that the employer had sought to justify its videotaping of current strikers on a picket line ''because of violence in a prior strike,'' but the judge was unable to ''find that that [such ''violence,'' presumably] has been established on this record,'' and thus he found that the videotaping violated Section 8(a)(1). Id. at 984 fn. 15. However, the Board summarily reversed the judge on this point (id. at 977 fn. 2), stating simply,

> Strikes in the recent past by the union involved violence directed at the Respondent's property and working employees. In this circumstance, the Respondent had reason to anticipate picket line problems and, accordingly, had a legitimate reason for taping pickets.

Obviously, the Board held in *Bozzuto's* that when an employer has experienced ''strikes in the recent past'' involving ''violence'' against the employer's property or its working employees, this will give the employer ''reason to anticipate picket line problems,'' and will, in turn, legitimize the employer's taping of currently peaceful strike-related picketing. What is less obvious, however, due to the Board's perfunctory discussion of the matter, is what evidence the Board relied on (a) to reverse the judge's finding that the employer had *not* ''established on this record'' that any such violence had occurred in the (single) ''prior strike'' referred to by the judge; or (b) to find instead that ''*strikes* in the recent past . . . involved violence.'' And because the Board's findings were so abruptly-stated, I am left uncertain as to how ''recent'' a strike involving violence must be to justify an em-

tle weight.'' Accordingly, until such time as the Supreme Court might reverse the Board on this point, I am bound to apply the Board's precedent, without regard to any conflict between the Board and any of the circuits. *Waco Inc*., supra at 749 fn. 14 (1984).

[77] And see, *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1050 (1994).

ployer's recording of picket line activities during a current strike.

Despite doubts about the factual basis for, and thus the precedential force of, the Board's disposition of the justification issue in *Bozzuto's*, I find this case to be distinguishable from *Bozzuto's* in an important respect: Here, NASSCO has invoked a history of violence arising primarily during *strikes*, including during an arguably ''recent'' one, to justify the recording of current rallies conducted in a *nonstrike* context by the unions to promote union solidarity among their *working* constituency. Strikes—at least those where the struck enterprise seeks to continue to operate—clearly carry the potential for hostile confrontations between strikers and nonstrikers or replacements, or between strikers and others seeking to do normal business with the struck enterprise. Here, that potential was lacking; the unions had decided in late February to have their members stay on the job while the contract struggle continued, and nothing resembling a continuous strike was taking place in early March. Indeed, no picketing activity occurred in aid of any strike action except during the three, 1-day strikes in April, May, and June. Thus, as of early March, when Hutchins began to record the rallies at gate 6, there was nothing inherent in the situation that might reasonably give rise to NASSCO's claimed fear of a renewal of the kinds of violence or other improper conduct at gate 6 that had occurred in previous *strike* situations, no matter how ''recently.''

It bears repeating before closing this discussion what rights NASSCO retained in the circumstances: It remained free to send agents to ''observe'' rallies at gate 6 or elsewhere on its premises, and to document by ''pictorial record-keeping'' any illegal or unprotected employee behavior if they saw it going on, even though the misconduct might take place in the course of otherwise protected activities. Beyond that, it seems implicit in some of the decided cases that if NASSCO agents honestly believed that unprotected misconduct was currently going on or was imminent, this honest belief would be sufficient justification for recording the activity,[78] especially if the recording were done to support an intended application for injunctive relief or other charges of civil or criminal misconduct.[79] Here, however, despite the fact that its agents were ''observing'' the rallies, there is no evidence of employee misconduct during the rallies, nor any evidence that NASSCO honestly believed that there was misconduct going on during the rallies, much less evidence that NASSCO planned to go to the police or to a court for relief against any such perceived misconduct. Rather, in agreement with the General Counsel, it is clear in the end that NASSCO's justification for its taping of the rallies is grounded in NASSCO's ''mere belief that something 'might' happen'' during the rallies, despite the absence of any evidence that anything *had* happened during the rallies or *could* happen during them that might provide reasonable nourishment for such a belief.

Considering all of the foregoing, I judge that NASSCO has not provided solid justification for its anticipatory recording of peaceful gate 6 rallies in the spring of 1993. Accordingly, I conclude as a matter of law that by such recording, NASSCO violated Section 8(a)(1) of the Act.

F. *Occasional Display of Video Gear in the Course of Observing Protected Rallies*

As I have previously found, Hutchins, beyond merely observing an all-union rally in the sandpit at lunchtime on September 16, admittedly carried with him a case containing a videocamera, against the possibility he might need to record the events if they were to ''get out of hand.'' (While I don't find it necessary to narrate the details, I find that Hutchins' observing presence at the rally on September 16 was linked to the fact that NASSCO had scheduled a ''Plate-Cutting Ceremony'' for the same afternoon, to be attended by Navy officials and local dignitaries, and Hinrichsen, recalling 1980, feared a union disruption of that ceremony, perhaps one that would be discussed during the sandpit rally.) Similarly, Hinrichsen's subordinate, Breece, admittedly carried a video camera as he stood in or near the gate 6 guardhouse while observing the happenings at rallies called outside gate 6 in March. (Breece also admittedly ''pointed'' his camera jokingly at a worker entering through gate 6, after the worker had, with equally facetious intent, called-out, ''Hey Woody, take my picture.'')

While merely carrying videotaping equipment may not have the same tendency to coerce employees engaged in protected activities or to deter their participation in them as does actual taping of their activities, I cannot say that it has no such tendency. Indeed, to carry the camera is to threaten its use; and when employees cannot be certain what actions or statements on their part might cause the camera carrier to switch it on, it may be presumed that the mere presence of the camera will inhibit or chill them in saying or doing things that are nevertheless protected by Section 7.[80] Accordingly, I conclude that while NASSCO agents could lawfully observe these rallies, NASSCO violated Section 8(a)(1) when its agents carried or displayed cameras in the course of their observing.

G. *The New System on Building 15 Introduced in Late October*

1. Pertinent facts recapitulated and amplified

Hinrichsen met in mid-October with Hallett, NASSCO's vice president and CFO, and Tom Fawcett, NASSCO's personnel director. Hallett told Hinrichsen and Fawcett that an ''upgrade'' in the plant protection security camera system was in the works, mainly to get better coverage of parking lots and a trolley stop across the street from gate 6, and, as well, to get better views of gate 6 itself, and the front door entrance to the ''I/R Building'' (building 1), just inside gate 6. Hallett explained that a number of new cameras would be

[78] See, e.g., *Lechmere, Inc.*, 295 NLRB 92, 99–100 (1989), reversed on other grounds, 502 U.S. 527 (1992); *Berton Kirshner, Inc.*, 209 NLRB 1081 (1974), enfd. 523 F.2d 1046 (9th Cir. 1975).

[79] *Lechmere*, supra, 295 NLRB at 99, citing *Bozzuto's*, supra, as authority for the proposition that ''the principle means of justification for [photographing or videotaping] activity is to secure evidence for injunctive proceedings to enjoin strike-related conduct or to establish that the picketing was unlawful under the Act.'' While I see nothing in *Bozzuto's* which might support the quoted proposition, I do find independent support for it in such cases as *Lucky 7 Limousine*, 312 NLRB 770, 807–808 (1993); *Concord Metal*, 295 NLRB 912, 921 (1989); *Roadway Express*, 271 NLRB 1238, 1244 (1984); and *Hilton Mobile Homes*, 155 NLRB 873 (1975).

[80] And see, *Holyoke Visiting Nurses*, supra, 313 NLRB at 1050.

installed on light poles in the parking lots across the street, and a new camera would be put atop building 15. (There were already two existing cameras mounted on building 15 to scan the gate 6 environs, but these did not cover the immediate gate 6 entry area, which was directly visible to guards in the guardshack, nor the entrance to building 1.) Hallett asked Hinrichsen if he had any objections to the new camera on building 15; Hinrichsen said he didn't, ''as long as it was a security camera,'' but he added, ''I don't think we ought to be taping these little gate rallies that are occurring,'' because ''it appeared that things were calming down and I didn't see any reason to tape.''[81]

Hinrichsen announced more details of the upgrading plans in letters sent on October 25 to Godinez and agents of the other unions. In material part, this is what Hinrichsen said:

> In the interest of improving plant security we will be installing some new monitoring cameras such as we presently have in operation in various locations. One . . . will be installed at Gate 6 and up to four additional cameras will be installed in Parking Lot #1. These cameras will be monitoring only but will have the ability to video tape if the security officers believe conditions are such that a record is needed.
>
> Our purpose in notifying you is so that you will be aware of these cameras. It is not our intent to record the peaceful informational meetings that you have been holding on Company property at Gate 6.

Godinez protested this announcement in a letter of reply which he hand-delivered to Hinrichsen on October 28. In the letter, Godinez reminded Hinrichsen that the Board had already issued complaints against, among other things, NASSCO's ''illegal use of video cameras.'' He also claimed that the now-installed camera on building 15 was being pointed at workers ''while they talked to the Union Activist.''[82] He also found it ''completely intolerable'' that a ''huge Directional Mike'' had been installed ''next to the new camera that points at every worker who is being viewed at the peaceful meetings.'' He also noted that ''workers have pointed out that out of all the NASSCO security cameras, this is the only one with an audio set up.'' He closed with a request that Hinrichsen ''[p]lease see that the Camera is not pointed at us during our meetings and get rid of that microphone by today, so we can hold our peaceful meeting *tomorrow morning*.''

Hinrichsen and Godinez had further exchanges of correspondence on this subject: Hinrichsen reiterated in his first reply letter that ''it is not our intent to record these public peaceful meetings,'' and suggested further that if Godinez or other union leaders didn't feel ''comfortable having your meetings in our parking lot near gate 6, please feel free to have your meetings at some other location.'' And in another reply on October 29, Hinrichsen stated, ''For the third time in writing, let me repeat that we do not intend to voice record your peaceful meetings or to videotape your peaceful meetings.'' I note, however, that Hinrichsen did not disavow his original announcement that ''[t]hese cameras . . . will have the ability to video tape if the security officers believe conditions are such that a record is needed.'' Neither did he agree to remove the microphone.

The much-disputed microphone associated with the new camera appears to have remained in operation until shortly after February 11, 1994, although the microphone setup itself became the subject of two refinements between late October and February 11. Thus, at some point in late 1993, the boom microphone attached originally to the camera itself was removed and replaced by a less conspicuous microphone mounted remotely, on the framework of a ''Digi-Dot'' sign at a higher elevation than the mounted camera's position. However, Hutchins and Clark, the maintenance supervisor with whom Hutchins was then working on perfecting the new system, found this intermediate location unsuitable. They eventually got approval (from Hallett, apparently; in any case, not from Hinrichsen) to engage a private contractor to install a new microphone, concealed within a small electrical junction box having sound holes only on its underside, and installed halfway down an ivy covered wall on the street side of building 15, near gate 6. The new microphone system, connected by wiring inside green painted conduit back to the new camera on the roof, was installed on or about February 1.

Hutchins' responses during examination from the bench make it reasonably clear that he and Maintenance Supervisor Clark intended by this February 1 microphone refinement to get better quality sound transmission of things being said in union rallies at gate 6. Thus, Hutchins acknowledged that the reason for scrapping the previous microphone arrangement on the Digi-Dot sign was that it was was positioned so high that ambient street noise ''eliminated being able to hear anything or pick up specific information or communications that we were trying to pick up.'' Then, asked, ''Specifically, what were those communications you were trying to pick up?,'' Hutchins replied, ''The bullhorns or whatever was going on, adjuration,[83] things of this nature.'' However, the concealed microphone was itself scrapped after the unions made a protest to Hinrichsen during a bargaining session on February 11. Moreover, Hinrichsen issued a memo to Hutchins on February 16, stating, inter alia, ''Recently, I discovered . . . that the . . . microphones were installed on the wall of Building 15 . . . . I have directed Jim Clark to remove them . . . [and] not to reinstall them any place else. Under no cir-

[81] By this time, I note, the Regional Director had already issued at least one complaint charging NASSCO with unlawful videotaping, and the unions had resumed their rallies at gate 6, following a summer hiatus.

[82] This was apparently a reference to Godinez himself. Godinez and employee Russell testified that on one or more occasions soon after the new camera was installed, they perceived that the camera was ''tracking'' or ''following'' Godinez as he moved among worker-participants in rallies at gate 6 and paused to converse with stewards or others. I will not find it necessary to determine if Godinez' or Russell's perception of Godinez as the target of the new camera's initial monitoring was correct. For one thing, the camera in question now operates on ''autoscan''; for another, my recommended order provides that NASSCO may not use any surveillance technology to purposefully monitor peaceful union rallies or other protected, concerted activities at gate 6 or elsewhere on NASSCO's premises.

[83] I think Hutchins here used the word *agitation*, and that *adjuration* is simply a mistranscription by the reporting service. Moreover, *adjuration* would be a strange word for Hutchins to use, especially in this context.

cumstances should anything of a similar nature be installed without my knowledge.''

However, the new camera on building 15 was never removed, even though it now operates in ''autoscan'' mode, panning across certain areas around gate 6, and stopping at prescribed points, such as the entrance doors to Building 1, the newspaper rack area next to gate 6, the parking lot immediately in front of gate 6, and the trolley stop located on a street median opposite gate 6. In this regard, I credit Hutchins that the camera has been operating on that preprogrammed series of automatic sweeps and stops since about 2 weeks after it was originally installed. I also credit Hutchins that he gave explicit orders to officers in the Security Department who monitor the camera that the camera was not to be taken off autoscan or to be used to follow union officials or employee-activists. (Many officers in Hutchins' department backed him up on this, and the parties stipulated that the other security officers employed during relevant periods would likewise testify that they had such orders and never disobeyed them.) Nevertheless, the new camera apparently continues to have the ''ability to videotape.''

2. Concluding analysis

I agree with most of the General Counsel's points and reasoning in support of his charge that NASSCO's operation of the new camera violated Section 8(a)(1). Thus, it is true, as the General Counsel points out, that the entrance to building 1 is the only area viewed by the new camera that was not already covered at least to some degree either by existing security cameras on building 15 or by the eyes of guards at the guardhouse ,just inside gate 6. Moreover, the General Counsel makes a solid point when he argues (Br. 40) that,

> [e]ven if the doors to Building 1 need to be observed, a fixed camera (without a microphone) would have sufficed. The microphones, of course, reveal the true purpose of the installation; listening to (as well as viewing) the employees' union activities. If microphones truly had a security purpose, they would have already been on *all* the [plant protection] surveillance cameras.

Thus, I find in all the circumstances that the ''microphone'' feature of the new camera betrayed NASSCO's wish at least to listen in on things being said during gate 6 rallies, and a similar motivation may be imputed to its installation of the new camera on building 15. Beyond this, however, I find it significant that Hinrichsen announced to the unions in late October that the new system involved a new feature, the ''ability to video tape if the security officers believe conditions are such that a record is needed.'' This announcement clearly implied that NASSCO's ''security officers'' would be making a special point of ''monitoring'' the rallies via the new video/audio system, and were prepared instantly to switch on the video/audio ''record'' feature whenever they might perceive a ''condition'' they felt deserved recording. I also note in this regard that NASSCO has not offered any other reason for introducing a microphone and the ''ability to video tape'' into the new camera system. And clearly, it has for years operated a system of passive monitoring cameras apparently lacking those features without any showing that such a system is inadequate to its legitimate, plant protection security needs, or the Navy's specifications.

Accordingly, in general agreement with the General Counsel's arguments, I conclude that that a significant reason for the new camera-with-microphone, as originally set up and refined through early February 1994, was NASSCO's wish to remotely monitor the gate 6 rallies by video/audio means. I further judge that this was a kind of ''anticipatory'' monitoring, which, when linked to the new system's ability-to-videotape feature, falls within the general proscriptions against ''pictorial recording'' of peaceful, protected activities reaffirmed in *F. W. Woolworth*, supra. Beyond that, I judge that NASSCO has not solidly justified such recording or implicit threat to record.

In reaching these conclusions I do not find it significant that NASSCO may only have intended by its introduction of the new video/audio system to have the ''ability'' to make a permanent record of events during gate 6 rallies judged by the ''security officers'' to warrant such a record. These particular features of the new camera necessarily implied to employees that NASSCO agents would be using electronic devices to watch, or ''monitor'' their protected activities at gate 6 on an ongoing basis. Moreover, because such monitoring was being done by video/audio devices that could be quickly switched over to ''record'' mode, the devices themselves were instruments of ''pictorial'' (and ''audial'') recordkeeping.'' Thus, the impact on employees of the introduction and use of the system announced by Hinrichsen in late October would seem to be just as unlawfully coercive as if an employer agent, shouldering a portable camera, were standing by and peering through the viewfinder at the ralliers, who could not be sure whether, or when, the camera might actually be ''recording'' their lawful activities. And seen this way, the mere operation of the new camera (whether or not linked to a microphone) would have at least as much tendency to chill or coerce employees in the exercise of Section 7 rights as did Hutchins' and Breece's unlawful display of video gear while otherwise lawfully ''observing'' union rallies, supra. Relatedly, for both of the foregoing reasons, the act of intentionally ''monitoring'' protected activities through video/audio gear is qualitatively different from, and ''more than,'' the kind of lawful, ''mere observation'' of those activities contemplated in cases referred to in *F. W. Woolworth*, supra.

Thus, I conclude as a matter of law that NASSCO's continued operation of the new camera—with or without microphone—for the purpose of enabling ''monitoring'' and possible recording of gate 6 rallies violated Section 8(a)(1).

REMEDY

Having found that certain actions of NASSCO constituted unlawfully coercive surveillance of employees engaged in peaceful concerted activity protected by Section 7 of the Act, I will order it to cease and desist from such behavior and to take certain affirmative action, including by posting a notice to employees assuring them it will not commit violations of the type found herein or any like or related violations. The main provisions of my order are relatively easy to define and rationalize: Because NASSCO's violations all involve at their essence the purposeful recording of or threat to record employees engaged on its premises in protected concerted activities, NASSCO must stop using any video/audio-capturing devices for that *purpose*; and, similarly, its agents must stop displaying or carrying such devices while otherwise lawfully

observing any such activities. However, for reasons further explained below, nothing in this order is intended to prevent NASSCO from using routine, passive video camera surveillance of shipyard environs for legitimate plant protection or security purposes, even if by such surveillance, images of protected activities may incidentally be transmitted to security officers monitoring these cameras.

In addition, I agree with the General Counsel that NASSCO's unlawful videotaping of gate 6 rallies in the spring of 1993 requires an affirmative remedy—destruction of all tape records of those rallies currently in NASSCO's possession. In this regard, I recognize, as NASSCO has insisted, that Hutchins' taped record of the morning rally at gate 6 on March 17, alone among all such tapes, served an ''evidentiary'' function in this case. Indeed, it was received as an exhibit, and I relied on it, in part, to find that the unions got the word out to workers to ''punch-out'' their timecards before attending the sandpit rally the same day—a signal that ''something'' was ''up'' that would prevent the workers from making a timely return to their jobs after the lunchtime rally. The evidentiary purpose of that tape has now been served; thus, I can see no business reason for NASSCO to retain that tape. However, recognizing that the tape is now an official exhibit in this case, my order that NASSCO shall destroy this tape as well as any other tapes in its possession of gate 6 rallies in the spring of 1993, is not intended to reach the official exhibit, nor to require NASSCO's attorneys or any other party to destroy the copies of that tape each was entitled to retain as part of its legal file in association with this case.

Were it not for the ongoing, ability-to-videotape feature of the new camera on building 15, the foregoing remedial order provisions might suffice to remedy the violations I have found. However, the ability-to-videotape feature leaves employees uncertain as to whether or when security officers monitoring their rallies might decide to make a pictorial record of their activities; thus, as previously noted, the existence of this feature has an inherent tendency to chill not just lawful conduct during such rallies, but to deter employees from participating at all in such rallies. And because of this, I judge that additional affirmative action by NASSCO is required, specifically the disabling of the ability-to-videotape feature associated with the new camera.

On brief (p. 45), the General Counsel would have me go beyond merely disabling the recording feature of the new camera and order NASSCO to ''[i]mmediately remove the permanent remotely controlled surveillance camera located on the northwest corner of Building 15.'' In the particular circumstances, where the new camera in question has been stripped of its microphone, and now operates on autoscan, this seems excessive and unwise. Rather, as I explain next, it seems enough in the circumstances simply to require NASSCO to get rid of the lingering ability-to-videotape feature of the new camera so that its function truly merges with that of the other cameras whose use by NASSCO is not in legal question.

Apart from the ability-to-videotape feature, the new camera on building 15 now seems to function, in fact, like the rest of the passive videocameras in the plant protection system. Perhaps the new camera's autoscanning of the area at gate 6 used for union rallies has resulted in the transmission of more images of such activities than previously. But if so, that fact alone would not be so dramatic as to warrant ''removal'' of that camera, especially where no challenge is raised to the continued use by NASSCO of other security cameras in the system that likewise have the incidental ability to transmit images of protected activities at gate 6 or elsewhere. Alternatively, if, contrary to my working supposition, the General Counsel is attacking *any* video system used by NASSCO which has the mere capability of transmitting an image of protected activity, I would dismiss that attack as lacking in merit. The integrated system of video cameras, when operated and used solely for plant-protection purposes, was clearly an established condition of employment at the shipyard, and was ''justified'' within the meaning of the authorities, supra, by NASSCO's plant protection needs. Moreover, if NASSCO's operation of the integrated camera monitoring system were indeed seen as a violation of employees' rights, I would be left in doubt as to how to remedy such a presumed violation without requiring NASSCO to do something that would strike me in all the circumstances as either impractical, undesirable, or merely silly.[84]

Essentially similar concerns cause me to question the wisdom of requiring NASSCO to remove a camera from its security system merely because it may have been originally intended and equipped to do double duty, both as a security monitoring device and as a means of remote monitoring and recording of activities at union rallies. Again, now stripped of its microphone, and now operating in autoscan mode, the only thing that now distinguishes the camera from the others in the plant protection network is its ability-to-videotape feature. And this feature can be disabled, thus returning plant

[84] Thus, NASSCO might be forced to cease all plant protection video monitoring entirely. (The Navy probably wouldn't like that, and neither, presumably, would NASSCO's employees—who, as Godinez has variously insisted, are fearful of theft or assault in NASSCO's immediate neighborhood, and who park their cars in lots monitored by these cameras, or get off at a nearby trolley stop across the street from gate 6, also covered by these cameras.) Or perhaps NASSCO might be permitted to maintain the passive surveillance system, but be held to a duty to ''avert its eyes''—presumably, by cutting off the video feed from any camera in the system—whenever it might *appear* that union activities were taking place within the monitoring sweep of those constantly-operating cameras, or were ''about to'' take place. (In the discharging of this presumed ''duty,'' NASSCO would probably exacerbate the very problem sought to be remedied, because it would necessarily require some responsible agent of NASSCO to engage in a continuous study of the video monitor, and to become especially vigilant whenever known or suspected union agents or stewards or rank-and-file workers believed to be strong union adherents might appear on screen, against the possibility that two or more of them might gather together to conduct some form of union activity that is not to be captured by video.) Or, failing that, NASSCO might be required to restrict any union or other protected concerted activity on its premises to ''non-public'' locations outside the viewing range of the video cameras. (The record does not clearly show that there are areas that these cameras can't see. But even if there are, NASSCO's resort to this course would deprive the unions and the bargaining unit employees of their traditional forum—the parking lot immediately outside gate 6—for communicating job related concerns among themselves and/or for delivering protests to company management about such concerns.)

protection surveillance conditions at gate 6 to roughly the same conditions that prevailed there historically. For these reasons, my order will not require NASSCO to remove the new camera, but only to physically disable it as a device that could be used to ''pictorially record'' employees engaged in union or other protected concerted activities at gate 6.

[Recommended Order omitted from publication.]